

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

140
IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,909

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL.,
Appellees.

No. 20,910

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant,


v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
ET AL., *Appellees.*

On Appeal from Order of the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 5 1968


Nathan J. Paulson
CLERK

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These Appeals arise out of the same District Court cases (Civil Actions No. 777-66 and 784-66 in the Court below) which were before this Court in Nos. 20,192, 20,193, 20,215 and 20,216, and disposed of within *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, — U.S. App. D.C. —, 385 F. 2d 581 (1967), *cert. denied*, 390 U.S. 923 (1968). The basic pleadings and papers in this litigation were before the Court in the Joint Appendix in the said Appeals, the pleadings as follows:

Complaint for Declaratory Judgment and Injunctive Relief, N.D. Ill., No. 66 C 320; Civil Action No. 784-66	p. 2
Defendants' Answer to Complaint and Counterclaim for Declaratory Judgment and Injunctive Relief, N.D. Ill., No. 66 C 320; Civil Action No. 784-66	p. 15
Plaintiff's Answer to Defendants' Counterclaim, Civil Action No. 784-66	p. 41
Complaint for Declaratory Judgment and Injunctive Relief, Civil Action No. 777-66	p. 43
Defendant's Answer to Complaint and Counterclaim for Declaratory Judgment and Injunctive Relief, Civil Action No. 777-66	p. 73
Plaintiffs' Reply to Defendant's Counterclaim, Civil Action No. 777-66	p. 85

Accordingly, they are not reprinted herein. These Appeals arise out of a District Court Order subsequent to the one involved in the said Appeals. The following relates to that Order.

Summary of Pertinent Docket Entries

January 5, 1967: Motions For Temporary Restraining Order, Preliminary Injunction by Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), and Affidavit of Theodore W. Armstrong.

January 12, 1967: Opposition of Galveston Wharves, and Affidavit of Oury L. Selig.

January 13, 1967: Motions of BLF&E for temporary restraining order and preliminary injunction argued; relief sought will be granted in form of declaratory judgment.

February 3, 1967: Hearing on Form of Order and announcement of reconsideration.

February 10, 1967: Hearing on reconsidered Order.

February 10, 1967: Order declaring furloughing of firemen involved in the application, who were hired after the effective date of Award of Arbitration Board 282, does not violate judgment of May 12, 1966; BLF&E motion for preliminary injunction against Galveston Wharves denied without prejudice to any administrative proceeding.

March 8, 1967: Notice Of Appeal (Civil Action No. 777-66), and Notice Of Appeal (Civil Action No. 784-66).

[Filed January 5, 1967]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 777-66

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL.,
Plaintiffs,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Defendant.

Civil Action No. 784-66

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Plaintiff,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
ET AL., *Defendants.*

Motion for Preliminary Injunction

The Brotherhood of Locomotive Firemen and Enginemen, defendant in Civil Action No. 777-66 and plaintiff in Civil Action No. 784-66, hereby respectfully moves the Court to enjoin, pending the final disposition of this matter, the Galveston Wharves, one of the plaintiffs in Civil Action No. 777-66 and one of the defendants in Civil Action No. 784-66, and each and all of its officers, agents, servants, employees, and attorneys, and those acting in concert or participation with it, from placing into effect Bulletin No. 559, posted at 4:00 P.M., January 3, 1967, to be effective 5:00 A.M., January 6, 1967, or any other Bulletin or other paper or action purporting to blank or abolish the job of any locomotive fireman or engineman to which a locomotive fireman or engineman was assigned, or which a

fireman or engineman had or filled, as of 12:01 A.M., March 31, 1966, or to remove from active employment, whether by furloughing or any other action except termination for just cause, any locomotive fireman or engineman who was actively employed at that time; on the ground that great and irreparable damage will be done to the Brotherhood of Locomotive Firemen and Enginemen and to its members and the employees whom it represents, unless such injunction is granted; all as is set forth more fully in the Affidavit of Theodore W. Armstrong, on file in this cause, and the attached Points and Authorities in support of this Motion.

/s/ JOSEPH L. RAUH, JR.
Rauh and Silard
1625 K Street, N.W.
Washington, D. C. 20006

/s/ ISAAC N. GRONER
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[Filed January 5, 1967]

Affidavit of Theodore W. Armstrong

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss:

THEODORE W. ARMSTRONG, being duly sworn according to law, deposes and says:

1. I am now and have been employed by the Galveston Wharves as a locomotive fireman and engineer for over twenty years. I am now and have been for over ten years the General Chairman of the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E") for the Galveston Wharves. The BLF&E represents all locomotive firemen and enginemen who are employed by the Galveston Wharves for purposes of collective bargaining and labor representation. In the regular course of the performance of the duties of my Union office, I am made aware of the Company assignments of locomotive firemen and enginemen, the seniority of the locomotive firemen and enginemen, and the working conditions, wage rates and other terms and conditions of their employment. Galveston Wharves is a switching terminal which accomplishes the railroad connection between the Galveston docks and the Southern Pacific Railroad, the Galveston, Houston & Henderson Railroad, which is owned by the Missouri Pacific Railroad, the Rock Island Railroad and the Santa Fe Railroad. Galveston Wharves employs approximately 20 firemen and enginemen and has one office on its property. I make this Affidavit from direct and firsthand knowledge.

2. At 4:00 P.M., Tuesday, January 3, 1967, Galveston Wharves posted its Bulletin No. 559 ("the Bulletin"), a copy of which is attached to this Affidavit and should be considered incorporated herein. The Bulletin purports to blank or abolish four fireman jobs, effective 5:00 A.M., tomorrow morning, Friday, January 6, 1967. These jobs are the fireman jobs, regular eight-hour day, full-time jobs,

Monday through Friday, inclusive, with Saturday and Sunday off, for the following hours, respectively, at 8:00 A.M. to 4:00 P.M., 3:00 P.M. to 11:00 P.M., 4:00 P.M. to 12:00 midnight, and 11:00 P.M. to 7:00 A.M.

3. All the fireman jobs specified in the Bulletin now have locomotive firemen working in them and have had locomotive firemen working in them for many years and certainly prior to 1963.

4. The four firemen who now hold and are employed in these jobs are, respectively: 8:00 A.M. to 4:00 P.M., J. M. Cornett; 3:00 P.M. to 11:00 P.M., C. B. Mayo; 4:00 P.M. to 12:00 midnight, D. Dice; and 11:00 P.M. to 7:00 A.M., F. Mills. Dice, who was hired on March 15, 1966, is now the fireman with the least seniority; Mills, whose employment date is February 16, 1966, is next lowest in seniority. Cornett, who is fifth from the bottom, was employed on January 29, 1956. Mayo, who is four places higher on the seniority list than Cornett, was hired on July 21, 1950.

5. The Bulletin lists only the four jobs which Galveston Wharves seeks to blank or abolish. Under the provisions and practice of the collective bargaining agreements and relationship between the BLF&E and Galveston Wharves, the men may exercise their seniority in terms of job assignments only when jobs are bulletined. The Bulletin lists no jobs which can be bid on in terms of seniority; it lists no jobs which are to be continued, only those which are purportedly to be discontinued tomorrow morning. The Bulletin thus obviously violates the seniority rights of the men as guaranteed by the provisions and practice of the collective bargaining agreements and relationship between the BLF&E and Galveston Wharves.

6. This irreparably damages the seniority rights of all firemen and enginemen, and not only those whose jobs are being abolished. If all jobs were open to bid, the men would make their choices in terms of seniority, and there would be changes in assignments which would affect more firemen

than the four who now fill the jobs intended to be abolished. For one example, D. W. Harrington, who is now the engineer on the 4:00 P.M. to 12:00 midnight locomotive job, has told me that as a matter of personal choice, he would rather have one of the hostler jobs than be forced to operate an engine without a fireman. If Harrington were to bid off from the 4:00 P.M. engineer's job, the next man in terms of seniority, J. W. E. Bear, Jr., whose seniority date is July 3, 1947, has told me he would move, if he could bid, from his present job, the 11:00 A.M. engineer's job, to the 4:00 P.M. engineer's job. This would open up Bear's present job and would lead to a succession of changes which would involve many firemen. So far as concerns the four jobs covered by the Bulletin, Mayo, if he were allowed to bid, has the seniority, as indicated above, to take another job, including a hostler job, rather than be forced on the extra board; Cornett will be forced to the extra board. Also H. A. Matzke, whose date of employment is July 13, 1956, will be forced to the extra board.

7. If seniority were allowed to operate and the Company sought to furlough three men, the three junior men, who would in the normal course be furloughed, would be Dice, Mills, and W. H. Biggs, whose date of employment is March 16, 1965.

8. Mr. Oury Selig, the official of the Galveston Wharves who is responsible for the conduct of labor relations, has told me, in a telephone conversation on January 3, 1967, that his legal counselors had advised him that the men could not be terminated but could be furloughed. The consequence of being furloughed is that the man will no longer be employed by Galveston Wharves and will receive no compensation from it, until he is recalled from furlough. That will not occur until one of the regular locomotive fireman positions should become vacant through attrition, through some cause such as death or retirement. Because these men are furloughed by the Company they will not receive any separation or severance allowance.

9. As noted above, the Bulletin lists no jobs which are open to bid in the exercise of seniority. However, the Bulletin contains the following statement: "C-6 or C-7 firemen, who in the exercise of their seniority are forced to the extra board by not being allowed to fill blankable jobs, will be guaranteed earnings equivalent to ten (10) straight time days per half month." Galveston Wharves has no more right to make this statement unilaterally than to abolish these jobs unilaterally. If it can successfully assert the right to abolish jobs unilaterally, it can change or withdraw this guarantee unilaterally. In the absence of any such guarantee, a fireman on the extra board will earn substantially less compensation than one holding a regular full-time job.

10. Furthermore, when a fireman is on the extra board, he is subject to call twenty-four hours a day, seven days a week. Article 27 of the Contract between Galveston Wharves and BLF&E includes the requirement that "Enginemen subject to call for extra service must be available to caller at all hours, and will be held responsible for any delay occasioned by caller being unable to locate them at their proper residence or headquarters."

11. The reference to "C-6 or C-7 firemen," noted in paragraph 9 above, is to a category which was defined by and applicable under a certain special Arbitration Award, which was issued under Public Law 88-108, which Congress passed in 1963. Congress specified that the Award could be effective for only two years or until such time as the parties agreed. BLF&E and the railroads agreed that it could be effective until 12:01 A.M., March 31, 1966, and it expired at that time. All the men involved were hired prior to the expiration of the Award. Under the Award, there were various categories of firemen, including so-called "C-2" men who were employed after November 25, 1961, and so-called "C-6" and "C-7" men who were employed prior to that date.

12. I have advised Galveston Wharves, in the telephone conversation with Oury Selig, referred to in paragraph 8 above, and a conversation on January 3, 1967, with A. Mlcak, the Foreman who signed the Bulletin, that the Bulletin is illegal. They have refused to take any action, but have kept the Bulletin posted and made clear that they and Galveston Wharves intend to put it into effect and enforce it.

13. I am advised and do believe that the Galveston Wharves has no basis or authority in law for attempting to enforce the Bulletin or any bulletin which would have the result of removing from active engine service and employment any locomotive fireman who was employed on the expiration date of the Award of Arbitration Board 282 or of making the compensation and working conditions of any locomotive fireman who was in active engine service and employment on that date substantially worse.

14. Unless this Court restrains and enjoins the Galveston Wharves from enforcing the Bulletin, the BLF&E will suffer irreparable damage. The Galveston Wharves will demonstrate in practice that it can unilaterally dictate that locomotive fireman positions can be abolished and locomotive firemen furloughed, without regard to the provisions of law. This will result in irreparable damage to the BLF&E.

15. Furthermore, the men involved will be irreparably damaged. Three of them will be losing all their income as locomotive firemen and enginemen; and two others may have their compensation substantially reduced at the Company discretion and will have their working conditions made substantially worse. The men may have to look for other sources of livelihood and may have to move their homes. All this is irreparable damage which this Court should not permit to happen. I believe that the interests of justice and fair dealing require this Court to take action

to insure that the Galveston Wharves not put the Bulletin or any such Bulletin into effect.

/s/ THEODORE W. ARMSTRONG

[Notarial Certificate]

GALVESTON WHARVES

January 3, 1967

BULLETIN NO. 559

To All Concerned:

Effective 5:00 A.M., Friday, January 6, 1967 the below designated jobs are blanked jobs and will be worked without a fireman:

8:00 A.M. to 4:00 P.M.—Monday thru Friday, Saturday and Sunday Off

3:00 P.M. to 11:00 P.M.—Monday thru Friday, Saturday and Sunday Off

4:00 P.M. to 12:00 M.N.—Monday thru Friday, Saturday and Sunday Off

11:00 P.M. to 7:00 A.M.—Monday thru Friday, Saturday and Sunday Off

C-6 or C-7 firemen, who in the exercise of their seniority are forced to the extra board by not being allowed to fill blankable jobs, will be guaranteed earnings equivalent to ten (10) straight time days per half month.

This Bulletin Posted 4:00 P.M., Tuesday, January 3, 1967.

This Bulletin Expires 4:00 P.M., Thursday, January 5, 1967.

/s/ A. MLCAR

Shop Foreman

[Filed January 12, 1967]

Affidavit of Oury L. Selig

OURY L. SELIG, being duly sworn, deposes and says:

1. I am Assistant to the General Manager of Galveston Wharves and I have held that position since 1964. My duties include primary responsibility for handling the Company's labor relations with the Brotherhood of Locomotive Firemen and Enginemen and with other unions. I performed the same duties under another title between 1954 and 1964. The statements made herein are based upon my personal knowledge or upon information obtained in the performance of my duties for Galveston Wharves.

2. Galveston Wharves, an agency of the City of Galveston, Texas, operates the docks located in the City of Galveston, Texas, and in connection therewith performs switching and other terminal services for the various railroads which provide rail connections with those docks. By reason of the performance of those services, Galveston Wharves is a "carrier" as defined in Section 1 First (145 U.S.C. § 151 First) of the Railway Labor Act. Galveston Wharves was a party to the Award by Arbitration Board 282 pursuant to Public Law 88-108 and was one of the plaintiffs in *Bangor and Aroostook Railroad Company et al. v. Brotherhood of Locomotive Firemen and Enginemen*, Civil Action No. 777-66. The Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as the "BLF&E") represents the locomotive engineers, locomotive firemen and helpers, and hostlers employed by Galveston Wharves.

3. To the best of my information and belief, Galveston Wharves at all times since March 31, 1966 has complied with and applied its rules and agreements governing the use of firemen (helpers) as modified by the Award of Arbitration Board No. 282, in accordance with the Judgment entered in the above-captioned cases on May 12, 1966 and in accordance with the Order entered in the above-captioned

cases on September 20, 1966. At no time since March 31, 1966 has Galveston Wharves separated any firemen (helpers) from employment pursuant to the provisions of Paragraphs C(2), C(3), C(4) or C(6) of Section II of the Award or offered comparable jobs to firemen (helpers) pursuant to the provisions of Paragraph C(6) of Section II of the Award.

4. Galveston Wharves operates a single terminal or yard which constitutes the only seniority district with respect to the use of firemen (and also other operating employees). As of January 3, 1967, firemen were regularly assigned to the following yard engine assignments Monday through Friday with Saturday and Sunday off:

7:00 a.m. to 3:00 p.m.
8:00 a.m. to 4:00 p.m.
3:00 p.m. to 11:00 p.m.
4:00 p.m. to 12:00 midnight
11:00 p.m. to 7:00 a.m.

All of these assignments have been listed by Galveston Wharves pursuant to Section II-B of the Award and only the 7:00 a.m. to 3:00 p.m. assignment has been designated or "vetoed" by the BLF&E pursuant to Section II-B of the Award so as to constitute a "must fill" or "non-blankable" job.

5. Prior to the effective date of the Award, the diesel locomotives used in the aforesaid yard assignments were not equipped with deadman controls. Early in 1965, Galveston Wharves ordered the necessary equipment to install deadman controls on these locomotives. Because of delays in shipment, which had been promised for 1965 and despite numerous efforts by Galveston Wharves to secure prompt delivery, all of the necessary parts did not arrive until April 15, 1966. The deadman controls were then installed but they did not work properly and it was finally ascertained, in August of 1966, that it would be necessary to

replace certain valves. The replacements were received and installed in December of 1966, and the deadman controls have since been in good operating condition.

6. Under the carrier's rules as modified by Paragraph II-B(5) of the Award, "no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition." In compliance with this rule, Galveston Wharves continued to use firemen on each of its yard engines, including the assignments which had not been vetoed by the BLF&E pursuant to Section II-B of the Award, throughout the period ending in December of 1966 during which the deadman controls either had not been installed or were not operating properly. After ascertaining that the deadman controls were in good operating condition following the installation of the replacement valves, Galveston Wharves posted its Bulletin No. 559, on January 3, 1967, a copy of which Bulletin is attached to the Affidavit of Theodore W. Armstrong. As stated therein, the said Bulletin was to become effective on January 6, 1967, but the application of the Bulletin has been postponed in accordance with the representation of counsel to the Court that the *status quo* would be maintained through January 13, 1966 to permit a hearing before the Court upon the motion by the BLF&E for a preliminary injunction.

7. Bulletin No. 559 provides for the "blanking" or discontinuance of the four firemen (helpers) assignments on yard engines described in paragraph 4 above which were not "vetoed" by the BLF&E and which, consequently, are "blankable" under the carrier's rules as modified by the Award. The one fireman (helper) assignment described in paragraph 4 above which has been "vetoed" by the BLF&E will not be affected by Bulletin No. 559 and a fireman will continue to be used on that assignment as required by the carrier's rules as modified by the Award.

8. Two of the assignments which will be blanked or discontinued under Bulletin No. 559 are now being filled by C-6 or C-7 firemen. Both of those firemen and all other C-6 and C-7 firemen employed by Galveston Wharves will continue to receive engine-service employment for which they are qualified within the carrier's one seniority district (unless they retire, are discharged for cause or are otherwise removed from the carrier's working lists of firemen by natural attrition) as is required by the carrier's rules as modified by the Award. After the four assignments specified in Bulletin No. 559 are blanked, Galveston Wharves will operate a sufficient number of regular assignments to provide such engine-service employment to all but two of its C-6 and C-7 firemen. With respect to the two such firemen for whom regular assignments will not be available, engine-service employment will be made available on the extra board maintained by Galveston Wharves as is more fully described in paragraphs 9-11 below.

9. For many years, commencing long prior to the effective date of the Award, Galveston Wharves has maintained an extra board. The persons on the extra board are used on extra assignments and to fill temporary vacancies in regular fireman assignments as, for example, where the fireman holding a regular assignment is absent because of illness. As a practical matter, the extra board also protects temporary vacancies in engineer assignments in that a fireman on the extra board replaces a regularly-assigned fireman or hostler who is used to fill the engineer vacancy. Article 12 of the Company's agreement with the BLF&E provides that:

"Extra Enginemen shall be worked first in and first out. No more engineers or firemen shall be assigned to extra board than is necessary to move business with promptness."

Under this provision, the number of persons on the extra board basically is determined by management, after discussions with the General Chairman, in accordance with its judgment as to the number of extra men needed to assure that extra assignments and temporary vacancies in regular assignments normally will be filled from the extra board rather than by using regularly assigned employees on an overtime basis. The persons assigned to the extra board are used in rotation as the need for the use of an extra man arises from time to time.

10. Arbitration Board No. 282 has repeatedly ruled that C-6 and C-7 firemen may be assigned to an extra board to meet the needs of the board so long as an undue forfeiture is not imposed upon any such firemen. See, *e.g.*, the clarification on June 30, 1965 of the answer to Southern Pacific Question 1(e) and BLF&E Question 2. While the number may vary from time to time, Galveston Wharves usually has had either two or three men on its extra board, and it is my judgment that two men will be needed on the extra board to meet the needs of the board after the assignments specified in Bulletin No. 559 are blanked. During the six months between July 1, 1966 and December 31, 1966, for example, sufficient work was available to provide an average of 20.5 days of work during each half-month period to the men on the extra board, so that each man on a two-man board could have averaged about five days per week. The earnings for the employees who were most frequently assigned to the extra board during those six months do not differ substantially from the earnings of employees in regular assignments. However, in order to be absolutely certain that any C-6 or C-7 fireman who may transfer to the extra board as a result of the abolition of the assignments specified in Bulletin No. 559 are not subjected to an undue forfeiture, the carrier provided in that Bulletin that: "C-6 and C-7 firemen, who in the exercise of their seniority are forced to the extra board by not being allowed to fill blankable jobs, will be guaranteed earnings equivalent to ten

(10) straight time days per half month." This means that each C-6 or C-7 fireman who transfers to the extra board will be guaranteed payment for working ten days straight time during each half-month period, whether or not he actually works that often. Such compensation is equivalent to that normally received by firemen holding regular assignments. Moreover, a C-6 or C-7 fireman on the extra board may exceed the compensation thus guaranteed if he is used more often during a half-month period than is necessary to earn the guaranteed amount, as may be expected to happen from time to time.

11. Under seniority rules established by agreement with the BLF&E long prior to the effective date of Arbitration Award 282, C-6 and C-7 firemen exercise their seniority to determine which firemen will fill a particular assignment made available by Galveston Wharves. That is, if a permanent vacancy exists in a fireman's assignment (including hostler assignments) the most senior fireman who claims or "bids" for that assignment is given the assignment. So, too, if an assignment is discontinued the fireman who is displaced may claim any other assignment which is held by firemen with less seniority. Hence, the carrier will not determine which of its C-6 and C-7 firemen will transfer to the extra board when the assignments specified in Bulletin No. 559 are abolished and the carrier will not control any other transfers which may occur as a result of the "bumping" of less-senior firemen from their present positions. Such transfers will be determined by the C-6 and C-7 firemen through the exercise of their seniority in accordance with long-established seniority rules, and this is a well understood and accepted aspect of the employment relationship between the carrier and its firemen.

12. In paragraph 8 above, I noted that two of the assignments to be blanked pursuant to Bulletin No. 559 are now held by C-6 or C-7 firemen. The other two of those assign-

ments are now held by C-2 firemen; that is, by firemen who were hired on or after January 25, 1962. Galveston Wharves also employs one other C-2 fireman who is the only fireman presently assigned to the extra board.* All three of these firemen were hired after the effective date of the Award: F. Mills was hired on February 16, 1966; D. Dice was hired on March 15, 1966; and W. H. Biggs was hired on March 16, 1965. Messrs. Mills and Dice now hold assignments to be blanked under Bulletin No. 559, and Mr. Biggs is now on the extra board.

13. Under the carrier's rules as modified by Award 282, C-2 firemen are not required to be used in "blankable" assignments such as those named in Bulletin No. 559. The carrier is required to use a C-2 fireman in a "must fill" assignment (such as a "vetoed" assignment or a hostler assignment) when no C-6 or C-7 fireman is available to fill the position, but it is not required to use a C-2 fireman in any other circumstance. When not needed to fill such "must fill" assignments, because sufficient C-6 and C-7 firemen are available, the C-2 firemen may be furloughed subject to recall when needed for that purpose. See, *e.g.*, the answers by Arbitration Board No. 282 to BLF&E Questions No. 80(a), 123, 133 and 147. When the blankable positions specified in Bulletin No. 559 are blanked, the carrier will have a sufficient number of C-6 and C-7 firemen to fill all regular assignments and the two extra board assignments which the carrier plans to maintain. Hence, the C-2 firemen will not be needed and the carrier plans to furlough those employees pursuant to its rules as modified by the Award. They will be recalled, however, whenever a situation develops in which sufficient C-6 and C-7 firemen are not available to fill the "must fill" assignments.

* Two C-2 firemen were on the extra board prior to January 3, 1967, when one of them was discharged for cause. Another C-2 fireman, who was employed on March 18, 1966, was furloughed pursuant to a reduction in force on May 12, 1966 and, so I am informed and believe, is now in military service.

14. Galveston Wharves is a party to a national agreement, entered into on August 11, 1946 between most of the nation's railroads and the BLF&E (as well as certain other unions). Section 17 of that agreement establishes a procedure applicable to "[a]ll claims and grievances arising on and after November 1, 1948" which an employee represented by the BLF&E may have against a railroad that is a party to the agreement. Under the claims and grievances procedure thus established, a fireman employed by Galveston Wharves who claims to have been injured by an alleged misapplication of the seniority rules or other rules governing the employment relationship between the fireman and the carrier may, within specified time limits, file his claim or grievance with a designated officer of the carrier and appeal any disallowance thereof up to the highest officer designated to handle such claims and grievances. If the claim or grievance is disallowed by the highest officer, it may be taken to the National Railroad Adjustment Board or to a special board of adjustment established under Section 3 of the Railway Labor Act (45 U.S.C. § 153). If the claim or grievance is allowed by the carrier, the National Railroad Adjustment Board or a special board of adjustment, the employee may be awarded compensation for any legal injuries which he is shown to have incurred as a result of the violation. Thus, firemen have an established legal remedy for alleged violations by Galveston Wharves of its seniority and other rules governing the employment relationship between the firemen and the Galveston Wharves.

15. I have read the Affidavit of Theodore W. Armstrong which has been filed by the BLF&E in the above-captioned cases. Any and all conclusions stated in the Armstrong Affidavit and any and all facts stated therein which are in conflict with my statements above are denied. Certain additional comments with respect to statements made by Mr. Armstrong are set forth below:

(a) With respect to the first paragraph of the Armstrong Affidavit, I note that Galveston Wharves also connects the Fort Worth & Denver Railway Company with the Galveston docks, and that the Galveston, Houston & Henderson Railroad Company is owned by Missouri-Kansas-Texas Railroad Company and the Missouri Pacific Railroad Company.

(b) With respect to paragraphs 5 and 6 of the Armstrong Affidavit, Galveston Wharves is not required to bulletin all assignments so as to open them for bids by the employees in the exercise of their seniority when existing assignments are abolished, as would be done under Bulletin No. 559. If Mr. Armstrong as General Chairman for the BLF&E desires that all assignments be opened up for bidding in connection with the abolition of the four assignments specified in Bulletin No. 559, however, I am willing to make such an arrangement with him and I have so informed Mr. Armstrong.

(c) With respect to paragraph 8 of the Armstrong Affidavit, the C-2 firemen who will be furloughed by Galveston Wharves when the assignments specified in Bulletin No. 559 are abolished will continue to be employed by Galveston Wharves unless they retire, resign, are discharged for cause or are otherwise removed from employment by natural attrition. As stated in paragraph 13 above, they will be recalled to active service (in the order of their seniority) if needed to fill a "must fill" job because sufficient C-6 or C-7 firemen are not available. That could result from the establishment of additional assignments due to an increase in work or for other reasons in addition to attrition of the C-6 and C-7 firemen.

(d) With respect to paragraph 9 of the Armstrong Affidavit, I have already noted that the guaranteed compensation to C-6 and C-7 firemen forced to the extra board is intended to prevent any undue forfeiture with respect to such firemen as required by the carrier's rules as modi-

fied by Award 282, and that the carrier will continue to be obliged to prevent any such undue forfeiture unless and until those rules are changed in accordance with the Railway Labor Act. I have also noted in paragraph 10 above that even apart from such guarantee employees assigned to the extra board in the past have earned substantially the same amount as employees holding regular assignments, and that this situation is expected to continue.

(e) With respect to paragraph 10 of the Armstrong Affidavit, I note that Article 27 of the agreement between Galveston Wharves and the BLF&E, referred to therein, was agreed to by the BLF&E and has not been affected in any way by Award 282. The obligation of employees assigned to the extra board to be available for call at all hours is a long-established feature of the employment relationship between Galveston Wharves and its firemen, and has been accepted as such by the BLF&E. I also note that some employees prefer to work off the extra board rather than in a regular assignment. For example, Mr. W. H. Biggs has remained on the extra board even though he had sufficient seniority to claim a regular assignment.

/s/ OUBRY L. SELIG

[Notarial Certificate]

Excerpts from Transcript of Proceedings of January 13, 1967

3 The Court: May I make an inquiry before you proceed.

Is this in the nature of an application at the foot of the decree?

Mr. Rauh: It could be called that. I think Your Honor has referred to it as that. It is an application for an injunction in view of the fact that they are violating, in our judgment, Your Honor's earlier decrees.

The Court: Very well. Nomenclature does not make much difference.

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11 The Court: Just what injunctive relief do you specifically request?

Mr. Rauh: I am asking that they not furlough these three men.

The Court: In other words—

Mr. Rauh: To give them work.

The Court: In other words, this is not an application in behalf of the C-6 or C-7 men who are being transferred to the extra board?

Mr. Rauh: We have included that, but I actually am not pressing that point at this moment.

The Court: You are discussing the question of C-2 men?

12 Mr. Rauh: The furloughing, the not giving of work to C-2 men, yes, Your Honor. That is the major part of our case.

I think the rest of the case is covered by what you did in September. In September you said they could blank jobs, do away with the firemen for the purpose of transferring men, and that I think, I regret to say, I think that covers the switch to the extra board. But it doesn't cover giving them no work.

* * * * * * * *

23 The Court: This is what bothers me here and bothers me very much: after all, in all these matters we want to get down to substantial justice. It seems unfair to me that these men are being furloughed, whereas if their services were being terminated they would be entitled to severance pay. When they are furloughed, from a practical standpoint they are in just as bad a position as though they were discharged, but they get no severance pay.

Mr. Shea: Well, Your Honor, of course furloughing does not mean discharging them.

The Court: No, it doesn't, but furloughing means that of course they can't claim any job that is on the extra board.

Mr. Shea: They may claim any of the must fill jobs. If those must fill jobs are not being occupied by persons with more seniority, such as the C-6 or C-7 men.

The Court: Well, a furloughed man, to use a government vocabulary, is granted leave of absence without pay; isn't that what it amounts to?

Mr. Shea: Yes, but he must be recalled, he must be recalled.

The Court: Well, isn't it a fact, as a realistic
24 matter, that there are a great many, hundreds and thousands of men over the years in railroad service who have been furloughed and stayed in furloughed status for years?

Mr. Shea: Well, Your Honor, I can't speak generally about it. Of course this would depend, I suppose, there have been times when railroad business has gone off so badly that there may have been such a case; but that is not true at the present time, of course.

I can't make any representations to the Court as to when, pursuant to attrition persons moving up to engineers, dying, retiring, et cetera, when jobs would open up; but the situation is that here is what the Award provides that these persons are entitled to.

* * * * *

Now I do see the equitable considerations which Your Honor is suggesting and I would be inclined to recommend to my client, if the Court please, and I will be glad to report to you on this, that if these persons would prefer to be severed with severance allowance, I would recommend to my client that they be given that.

The Court: That is what I had in mind.

Mr. Shea: But addressing myself specifically now to their legal rights, as an equitable matter my inclination would be to recommend that to my client if they would choose it.

* * * * *

38 The Court: Are the C-2 men involved in your motion men who were hired prior to the expiration date of the Award or subsequent to the expiration date of the Award? That might make a difference.

Mr. Rauh: I don't think it does, but I can ask.

The Court: Oh, yes, C-2 relates—

Mr. Rauh: All prior to the expiration of the Award, Your Honor.

The Court: In other words, there is no protection given to anyone hired after the expiration of the Award.

Mr. Rauh: They were all before the Award, so
39 that the question Your Honor has asked me is academic. I think I would have a different view, but it doesn't matter because they all were prior to the Award.

The Court: I think it makes a vast difference because the Award does not deal with people who were hired later.

Mr. Rauh: I don't want to argue about it because they were all hired before. I just don't want the record to indicate that we accept that. It is not before Your Honor. The three men were—

The Court: I just wanted to be sure that the C-2 men involved in this morning's proceeding were all hired before the expiration date of the Award.

Mr. Rauh: They were, Your Honor. The affidavits of both persons make that clear, both the railroad and the union make that clear.

• • • • • • • • •

Opinion of the Court

48 The Court: This application involves the status of a group of firemen referred to in Award 282 as C-2 firemen, that is, those men who were hired within a period of two years before the date of the Award.

There seems to the Court to be a casus omissus in the Award as to what tenure, if any, is to be accorded to C-2 firemen after the termination of the effective period of the Award.

The Award, in part (C), paragraph C(2), expressly authorizes the carriers to separate these men from the service, but in that event it requires the carriers to pay separation allowance. Nothing is said as to what happens to these men after the expiration of the Award.

Now we come to the decree of this Court, in this case filed on May 12th, 1966. Paragraph 4 of that decree provides that after the expiration of the Award the railroads

cannot terminate the employment of firemen pursuant to the provisions of paragraphs C(2), C(3),

49 C(4) or C(6) of Section II of the Award and cannot offer comparable jobs to firemen pursuant to the provisions of paragraph C(6) of Section II of the Award. In other words, this protects the tenure of C-2 men after the termination of the effective period of the Award, as well as the tenure of other groups.

The Court is of the opinion that to furlough a man whose employment cannot be terminated is in effect or in part a nullification of the tenure granted in paragraph 4.

The Court will not delve into the recesses of the mind of the personnel officer of the carrier who decides to furlough a particular person. Very likely he does so with regard to the efficiency of the operation of the railroad and very likely he does not have in mind any purpose to avoid the prohibitions of paragraph 4, but the effect may well be the same as an intentional avoidance of that prohibition because the status of being furloughed may mean being without employment for an indefinite period.

The Court is constrained to reach the conclusion that the men involved in this application may not be furloughed.

Counsel may submit an appropriate order in the form of a supplemental declaratory judgment in accordance with this ruling.

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12 **Transcript of Proceedings, Atlantic Coastline R.R. Co., et al. v. Brotherhood of Railroad Trainmen, Civil Action No. 2908-66, January 19, 1967**

The Court: Thank you, gentlemen. I appreciate your cooperation throughout this proceeding and I think I mentioned it in my opinion.

Mr. Shea, there is one matter I want to mention to you. I am sorry that Mr. Rauh is not here. In reference to the matter that was before me where I granted Mr. Rauh's application to restrain the furloughing of C-2 men, I have been perplexed and perturbed by the question whether there isn't an error in that decree in including C-2 men.

13 I don't know. Of course, I said to you at the hearing that I am not going to change the decree summarily or offhand. If there is an error in the decree it can be corrected by motion under Rule 60 of the Federal Rules of Civil Procedure, because the situation did perturb me. However, I enforced that provision of the decree literally as I saw it.

Mr. Shea: Well, we had in mind bringing that matter back to your attention. Our intention was to do it on the issue of the judgment, but we will also add to that a motion for possible modifications of the earlier decree on this point.

The Court: Well, that is entirely a matter for counsel.

Mr. Shea: But I had in mind raising that point with Your Honor sometime next week.

* * * * *

Excerpt from Transcript of Proceedings of February 3, 1967

2 Mr. Rauh: * * * The question is the order to be entered in relation to Your Honor's opinion of January 13, concerning the Galveston Wharves matter.

On January 25th we submitted an order and on the same day the Galveston Wharves submitted an order. The difference between the two orders is simply that ours covers a declaration concerning the matter in general, and the Galveston Wharves order says, "under the circumstances disclosed by the affidavits on file."

Since there are really no special circumstances, nothing more than the general idea of a furlough, we respectfully suggest that Your Honor should sign the order which we submitted. It follows in exact terms Your Honor's decision of the 13th of January and we would urge it upon Your Honor.

The Court: I very carefully reviewed all the papers on both sides and I again studied the Award 282 and I am inclined to the conclusion that my decision was erroneous.

I think what started me along the line of thought
 3 that led to my conclusion was the impression that I gathered—and it was my fault that I gathered it—that the three men involved in the Galveston Wharves motion had been hired prior to the effective date of the Award, whereas it now appears they were hired subsequently.

To be sure, in either event they would be in the C-2 group, but men who were hired prior to the effective date of the Award naturally have a greater equity because those that were hired later realize that they were probably on a temporary basis.

Now analyzing the C-2 provision, any C-2 men—and these three men were C-2 men—may be dismissed, but if they are dismissed they are entitled to a lump sum separation allowance to be determined as provided in Section 9 of the Washington Job Protection Agreement of May 21st, 1936. There is nothing said about furlough and I agreed with you, Mr. Rauh, that there is something inherently unfair to furlough a person in a manner in which theoretically he is on the payroll but actually he may never earn a penny, and yet not give him a separation allowance, and I thought that possibly this was an inadvertent omission, a casus omissus in the Award and possibly it should be construed as giving
 4 an election to the C-2 man whether to be on the furloughed list or to have his employment terminated. But I confess I was rather surprised that this matter has been disposed of by Board 282 in reply to

the Brotherhood's Question No. 34. That question reads as follows:

"Are employees hired as helpers (firemen) subsequent to the effective date of the Award, January 25, 1964, to be considered as protected employees under the Award or subject to the various selection and termination procedures contained therein?"

"Answer: The right of the carrier to furlough employees hired after the effective date of the Award is controlled by the local collective bargaining agreements and is not limited by the Award. If, however, such employees are separated from the carrier's payrolls and have all their employment and seniority rights and relations terminated pursuant to Part C, Paragraph C(2) of the Award they are also entitled to the separation allowances provided by that paragraph."

I infer from that answer that there was no inadvertence on the part of the Board.

5 Now under those circumstances I think this Court is without power to enjoin the furloughing of these employees. I think if they have a grievance it is in the nature of a minor dispute that should be submitted either to the Railroad Adjustment Board or, better yet, to one of the new local boards provided by the recent Act of Congress.

Now that is my reaction, but I will be glad to hear from you on that.

* * * * *

Excerpt from Transcript of Proceedings of February 10, 1967

2 Mr. Rauh: Good morning, Your Honor.

May it please the Court, last Friday, February 3rd, when I arose to present Your Honor with an order in the Galveston Wharves matter, Your Honor raised certain questions indicating that he was thinking of reversing his earlier position.

The Court: Yes, on going over the matter again in connection with examining the drafts of the proposed order I came to the conclusion that I erred in my decision, tentatively, of course, and I therefore am glad to hear what you might call a reargument.

23

* * * * *

Opinion of the Court

The Court: This is a motion at the foot of the decree for an injunction restraining the furloughing of three firemen in the so-called C-2 group by Galveston Wharves. Although only three employees are involved in the present motion, actually it covers a wider area.

The purpose of Award 282 was to allow the railroads to dispense with firemen on 90 percent of freight runs, but at the same time to prevent the wholesale discharge of firemen and to give permanent tenure to firemen who might be regarded as permanent employees. Accordingly, all firemen who had more than two years' employment were given a certain permanency of tenure. In the case of those who had more than ten years, their permanency of tenure was practically unqualified. There was a limitation as to those whose employment ran between two and ten years, which need not be considered. The Court held that the firemen in question, known as C-6 and C-7 firemen, acquired vested rights during the effective period of the Award and that the termination of the Award did not divest those rights.

No permanency of tenure, however, was affirmatively granted by the Award to firemen who had been hired either within the two-year period prior to the effective date
 24 of the Award or thereafter. Apparently there was no intention on the part of the Board to give permanent tenure to those employees who had not achieved a long period of service.

The decree of May 12th, 1966, paragraph 4, provides that after the expiration of the Award the railroads cannot ter-

minate the employment of firemen pursuant to the provisions of Paragraph C(2), C(3), C(4) or C(6) of Section II of the Award, which obviously means that no action can be taken by the carriers under those provisions subsequent to the expiration of the Award. It cannot be construed as granting permanent tenure to the employees involved in the group presented by this motion, that is, employees who were hired during the effective period of the Award or thereafter. However, C-2 firemen were given a certain privilege that if their employment was terminated they were entitled to severance pay. There is no provision in the Award concerning the effect of a furlough.

The Court has been impressed by the argument of counsel for the employees to the effect that to furlough an employee under present conditions might result in giving him no work at all and cut off his earnings and yet, if construed literally, there would be no right to collect severance pay. Were the question open the Court
 25 would seriously consider construing the Award as giving the furloughed fireman the right or the privilege of construing the furlough as a termination of services and therefore give him the right to collect severance pay. This Court, however, may not construe the Award on points that have been unambiguously construed by the Board. The Railway Labor Act gives an arbitration board the power to construe its own award and in effect makes such construction a part of the award.

The Board has rendered numerous opinions construing the Award on specific points. These opinions have been rendered in the form of answers to questions. Question 34 of the B.L.F.&E. reads as follows:

"Are employees hired as helpers-firemen subsequent to the effective date of the Award (January 25, 1964) to be considered as protected employees under the Award, or subject to the various selection and termination procedures contained therein?

26 "Answer: The right of the carrier to furlough employees hired after the effective date of the Award is controlled by the local collective bargaining agreements and is not limited by the Award. If, however, such employees are separated from the carrier's payrolls and have all their employment and seniority rights and relations terminated pursuant to Part C, Paragraph C(2) of the Award, they are also entitled to the separation allowances provided by that Paragraph."

So, too, Question 133 submitted by the Brotherhood reads as follows:

"May the Burlington Railroad arbitrarily furlough and refuse to recall to service those helpers-firemen hired since implementation of Award 282, when vacancies exist on must fill jobs even though C-6 or C-7 men may be working blankable jobs?"

"Answer: On the basis of the facts presented which indicate that no must fill jobs were operated without a fireman (helper), the carrier did have the right to furlough the firemen (helpers) who were hired subsequent to the effective date of the Award."

27 In other words, it is the view of the Board that its Award should not be construed as limiting the rights of the carrier to furlough C-2 firemen, that is, firemen hired after the effective date of the Award or within the preceding two years, except insofar as those rights may be controlled by the local collective bargaining agreements.

The construction of the Award is binding on this Court and the Court therefore is constrained to deny the motion for supplemental relief. This denial is, however, without prejudice to any administrative proceeding that may be

brought before the National Railway Adjustment Board or before a local board created to handle such matters.

You may submit an order accordingly.

(A proposed order was handed to the Court.)

The Court: Well, I want to add "without prejudice to administrative proceedings."

(The hearing stood concluded.)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 777-66

C.A. 784-66

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Plaintiffs*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Defendant.

—

C.A. 1686-66

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Plaintiff,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Defendant.*

Washington, D. C., Wednesday, September 7, 1966

* * * * *

83 The Court, as it has ruled heretofore, is not going to determine individual grievances of individual employees or disputes concerning specific cases. The principle of forum non conveniens would preclude doing that. The Court will not draw here to Washington the task of dis-

posing of possible individual controversies in all other parts of the country.

The Court is of the opinion that these would constitute minor grievances within the jurisdiction of the National Railroad Adjustment Board. Title 45, Section 153, which in part governs the jurisdiction of the Board, provides in sub-section (h) that the first division of the Board shall have jurisdiction over disputes involving train and yard service employees of carriers, that is, engineers, firemen, hostlers and outside hostler helpers, conductors and yard service employees.

Sub-section (i) vests in the Board jurisdiction over disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.

84 In addition to that, by the Act of Congress approved June 20, 1966, Public Law 89-456, machinery is created for the appointment of Special Boards of Adjustment to resolve disputes otherwise referable to the Adjustment Board. Such local boards will, it is hoped, eliminate the delays that have occurred before the National Railroad Adjustment Board due to the volume of business with which that Board has been confronted.

The Court sees no reason for granting any injunctive relief. It will, as it has done on prior occasions, render its decision in the form of a declaratory judgment setting forth the principles heretofore outlined in this oral opinion.

These principles will govern the disposition of any controversy that may arise. If there is any dispute as to the application of any one of these principles to any particular situation as it has been stated, that can be referred either locally to the National Railroad Adjustment Board or to a Special Board of Adjustment created under the new statute.

• • • • •

[Filed February 10, 1967]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 777-66

Civil Action No. 784-66

Order

The Court having entered a Judgment in these proceedings on May 12, 1966; the Brotherhood of Locomotive Firemen and Enginemen having filed a Motion for Preliminary Injunction against Galveston Wharves which has been deemed with the consent of counsel for the respective parties to constitute an application at the foot of said Judgment for additional declaratory relief; affidavits and memoranda of points and authorities having been filed; arguments by counsel for the respective parties having been heard and the Court having delivered an oral opinion on January 13, 1967; further memoranda having been filed and further arguments by counsel for the respective parties having been heard; the Court having reconsidered its oral opinion of January 13, 1967 and having delivered a further oral opinion on February 10, 1967, which opinion of February 10, 1967 constitutes its findings of fact and conclusions of law,

IT IS THEREFORE ORDERED:

1. The furloughing of the firemen involved in the application, who were hired after the effective date of the Award by Arbitration Board 282, does not violate the Judgment of May 12, 1966 under the circumstances disclosed by the affidavits on file.

2. The Motion for Preliminary Injunction is denied, without prejudice to any administrative proceeding.

Dated: February 10, 1967

/s/ ALEXANDER HOLTZOFF
United States District Judge

BEFORE THE ARBITRATION BOARD

Established by Joint Resolution of Congress

Approved August 28, 1963

Public Law 88-108

Arbitration Board No. 282

National Mediation Board

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN,
AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES

and

CERTAIN OF THEIR EMPLOYEES REPRESENTED BY THE BROTHER-
HOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCO-
MOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY
CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILWAY
TRAINMEN, AND THE SWITCHMEN'S UNION OF NORTH
AMERICA

Washington, D. C.

November 26, 1963

Award

• • • • •

II. USE OF FIREMEN (HELPERS) ON OTHER
THAN STEAM POWER

PART A—SAVING CLAUSE

A (1). All agreements, rules, regulations, interpreta-
tions, and practices, however established, with respect to
the employment of firemen (helpers) shall continue un-
disturbed except as modified by the terms of this Award.

PART 2—REDUCTIONS IN JOBS

B (1). Within 7 days following the effective date of
this Award, each carrier covered by this Award shall have
the right to give to each local chairman of the organiza-

tion representing firemen (helpers) in each fireman (helper) seniority district a list of pool and regularly assigned freight engine crews (including pool and regularly assigned crews used in mixed, miscellaneous, and unclassified services) and a list of regularly assigned yard engine crews (including regularly assigned crews used in transfer, belt line, and miscellaneous yard services) then employed by the carrier in each such seniority district. The two lists shall include those engine crews which, in the carrier's judgment, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper).

B (2). Each local chairman, within 30 days of receipt of the carrier's lists, shall have the right, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, to designate the engine crews in which the carrier shall be required to continue to use firemen (helpers); provided that such designated crews shall not be more than 10 per cent of the freight engine crew, nor more than 10 per cent of the yard engine crews, in any seniority district, as such crews are listed by the carrier. Each local chairman's designation of crews to be operated with firemen (helpers), made as provided herein, shall be final and binding upon the parties in interest and shall not be subject to challenge or review; but prior conference shall be had between the parties in interest with respect to the crews to be so designated by the local chairman. The time and place for the beginning of such conferences shall be agreed upon within 10 days after the receipt of the carrier's lists by the local chairman, and said time shall be within 20 days after the receipt of the said lists.

B (3). At 3-month intervals following the date of the carrier's original lists, the carrier shall give to each local chairman lists of pool and regularly assigned freight engine crews and of regularly assigned yard engine crews

which have been established or discontinued in each seniority district during the preceeding 3 months and which meet the criteria set forth in paragraph B (1) of this Award; and the number of crews designated by the local chairman in which the carrier shall be required to use firemen (helpers) shall thereafter be adjusted, in the manner provided in paragraph B (2) of this Award; provided that not more than 10 per cent of the pool and regularly assigned freight engine crews nor more than 10 per cent of the regularly assigned yard engine crews, then employed by the carrier in any seniority district and included in either list, shall be designated as crews in which firemen (helpers) must be used.

B (4). Copies of all lists herein required to be furnished by the carrier to the local chairman shall be furnished to the general chairman of the organization involved.

B (5). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraph B (2) and B (3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition.

PART C—REDUCTIONS IN EMPLOYMENT

C (1). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to hire firemen (helpers) on other than steam

power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services) unless or until such new hire is needed to man engine crews designated by a local chairman as provided in paragraphs B (2) and B (3) of this Award; and firemen (helpers) that are unneeded to man such designated crews may be separated from the carrier's payrolls and have all of their seniority and employment rights and relations terminated to the extent permitted in the following paragraphs of Part C of this Award.

C (2). Firemen (helpers) hired on or after a date 2 years prior to the effective date of this Award may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated, and in such case shall be entitled to a lump sum separation allowance in an amount to be determined as provided in Section 9 of the Washington Job Protection Agreement of May 21, 1936.

C (3). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award whose average monthly earnings as firemen (helpers), hostler helpers, hostlers, or engineers have not exceeded \$200 during the 24 full calendar months preceding the effective date of this Award, may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated with a severance allowance equal to 100 percent of their earnings during the preceding 24 calendar months; or may elect to remain on the seniority lists of the carrier with rights to such work as they are qualified to perform, and which may be or become available to them, as provided in Part D of this Award.

C (4). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award, who have not performed service as an engineer or as a fireman (helper)

since that date, may be separated from the carrier's pay-rolls as firemen (helpers) and have all of their employment and seniority rights and relations as firemen (helpers) terminated with no severance allowance.

C (5). The provisions of paragraphs C (3) and C (4) of this Award shall not apply to officers or employees of the organizations representing firemen or engineers employed by the carrier, or to supervisory or management officials of the carrier, or to employees on appropriate leaves of absence, or to discharged employees whose cases for reinstatement are pending, providing, if not so situated, they could have met the minimum requirements of service or earnings.

C (6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority

district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in that event, he shall be entitled to one-half the severance allowance provided for in paragraph C (3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided, the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice, or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

C (7). Firemen (helpers) with 10 or more years of seniority as of the effective date of this Award, who are not separated from the carrier's payrolls under the provisions of paragraphs C (3) or C (4) of this Award, shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of firemen (helpers) by natural attrition.

PART D—RIGHTS TO WORK

D (1). Firemen (helpers) who elect to remain on the seniority lists of the carrier as provided in paragraph C (3) of this Award shall be entitled to exercise their seniority rights as firemen (helpers) to available employment in engine crews used in passenger service and in freight and yard engine crews designated by the local chairmen in their respective seniority districts as provided in paragraphs B (2) and B (3) of this Award, as hostlers or hostlers helpers, and as engineers in any class of service for which they are qualified; but such firemen (helpers) shall have no rights to and shall not claim seniority rights to or employment in any other service.

D (2). Firemen (helpers) who remain on the active working lists of the carrier under the provisions of paragraphs C (6) and C (7) of this Award shall have the right to work their turn as firemen (helpers) to the extent that positions as firemen (helpers) are available in their respective seniority districts on locomotives of the type to which firemen (helpers) were assigned and in a class of service calling for the service of a fireman (helper) prior to the effective date of this Award; provided, that such firemen (helpers) shall have no right to jobs that the carrier may discontinue pursuant to the provisions of this Award if other employment in any class of engine service, for which they are qualified, is available to them in their respective seniority districts. Such firemen (helpers) will have their seniority rights, existing as of the effective date of this Award, for promotion in their turn, preserved.

D (3). Extra lists shall be adjusted and firemen (helpers) shall be furloughed and recalled pursuant to the provisions of rules in effect as of the day before the day this Award becomes effective, as modified by and subject to the provisions of this Award; provided, that the carrier shall not be required to use firemen (helpers) covered by paragraph D (2) of this Award in freight or yard crews, other

than in crews designated by the local chairmen pursuant to the provisions of paragraphs B (2) and B (3), if the services of such employees are required on the extra list to fill vacancies in crews or positions where firemen (helpers) must be used, as in passenger service or under the provisions of this Award.

D (4). Firemen (helpers) retained in service under the conditions set forth in Parts C and D of this Award, when assigned to the extra lists for firemen (helpers), shall not be called to fill vacancies in crews in freight and yard service which have not been designated by the local chairmen pursuant to the provisions of paragraphs B (2) and B (3) of this Award if and when their services are required to fill temporary vacancies as locomotive engineers, or temporary vacancies for firemen (helpers) in passenger service, or temporary vacancies for firemen (helpers) in crews designated by the local chairmen as provided in paragraphs B (2) and B (3) of this Award.

PART E—CONTINUING STUDY

E (1). Within 30 days following the effective date of this Award, the parties shall establish a National Joint Board charged with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect. During the 3-month period before the date this Award is due to expire, the National Joint Board shall prepare and issue to the parties a report based on its study.

E (2). The National Joint Board established in paragraph E (1) shall consist of 4 members, of whom 2 shall be selected by the carriers, and one each by the Brotherhood of Locomotive Firemen and Enginemen, and by the Brotherhood of Locomotive Engineers. The expenses of the Board shall be borne by the participating parties.

Interpretations of Arbitration Award No. 282

BLF&E Questions

Question: 28. May the carrier force a helper-fireman, covered under Paragraphs C-6 or C-7 of the Award, from a blankable assignment to the extra board to cover vacancies on vetoed positions, passenger service, hostling service, instead of hiring additional helper-firemen?

Answer: (10-23-64) Yes. In connection with this question the attention of the parties is called to the Board's answers to BLF&E Questions No. 56 and No. 74(a).

* * * * *

Question: 34. Are employees hired as helpers-firemen subsequent to the effective date of the Award (January 25, 1964) to be considered as protected employees under the Award, or subject to the various selection and termination procedures contained therein?

Answer: (10-23-64) The right of the carrier to furlough employees hired after the effective date of the Award is controlled by the local collective bargaining agreements and is not limited by the Award. If, however, such employees are "separated from the carrier's payrolls and have all their employment and seniority rights and relations terminated" pursuant to Part C, Paragraph C(2) of the Award, they are also entitled to the separation allowance provided by that Paragraph.

* * * * *

Question: 60(b). May the carrier refuse to call a helper-fireman from the extra list to cover a vacancy on a yard assignment, using an engine equipped with a deadman control, when said helpers-firemen are available and may lose one or more day's work through carriers' operation of such assignments without a helper-fireman?

Answer: (9-16-64) (b) The carrier may not refuse to call a C-6 or C-7 fireman-helper to fill a vacancy on a blankable yard assignment where the engine is equipped with a

deadman control if the refusal to so call would result in the C-6 or C-7 fireman-helper losing a day or more of work.

• • • • •

Question: 74(a). It is the position of certain carriers that they are allowed to "blank" regular assignments on a seniority district to the extent that C-6 and C-7 helpers-firemen are forced to the extra board, or in some instances furloughed, and thereby deprived of a regular job on which they would otherwise be working under the schedule rules and in accordance with their seniority. Is this position of the carriers correct?

Answer: (9-16-64) If additional extra men are needed on the extra board, the carrier may require C-6 or C-7 men, beginning with the most junior man, to relinquish blankable assignments and thereupon be placed on the extra board. C-6 and C-7 firemen may not be furloughed as a result of the application of this Award when the carrier is operating blankable jobs without firemen.

• • • • •

Question: 76. Is it the intent of the Award to allow a carrier to operate a "blanked" or "blankable" assignment without a helper-fireman, when helpers-firemen are available on the extra board and may lose one or more day's work if not called to perform service?

Answer: (9-16-64) The principle expressed in the Board's answer to BLF&E Question No. 60(b) is applicable and controlling.

• • • • •

Question: 80(a). It is the carriers' contention that helpers-firemen hired subsequent to the implementation of the Award (March 7, 1964), need only be called to fill vacancies in passenger service, hostling service, and on vetoed jobs as prescribed in Paragraph C-3 of the Award. The employees contend that such helpers-firemen are to be allowed full and complete exercise of their seniority to any existing

assignment in accordance with schedule rules. Which is correct?

* * * * *

Answer: (10-23-64) (a) The carriers' contention is correct.

* * * * *

Question: 123. Article 6, Section 5 of the BLF&E Schedule Agreement in effect on the St. Louis-San Francisco Railway reads in pertinent part as follows:

"There shall be a blackboard kept at all roundhouses on which shall be kept posted the leaving time of all trains and the names of all extra firemen on hand. The first fireman arriving at a terminal will be the first fireman out, regardless of terminal delay."

The management now contends that the foregoing rule was modified by Award 282 and that they may now withhold a first-out extra helper-fireman, who has been employed or re-employed since implementation of the Award, from a vacancy on an extra assignment. This in turn requires a second or third out C-6 or C-7 helper-fireman to run around the aforementioned employee which the organization contends is a violation of the Award and the agreement rule as cited. Which contention is correct?

Answer: (5-6-65) The Award does have the effect of modifying the rule referred to in the question insofar as C-3 firemen (helpers) are concerned. This was indicated in the Board's answers to BLF&E Questions 15 and 65. Inasmuch as new hires are entitled to no greater rights than C-3 firemen it follows that the rule is modified with respect to new hires also. (Employees Dissent)

* * * * *

Question: 133. May the Burlington Railroad arbitrarily furlough and refuse to recall to service those helpers-firemen hired since implementation of Award 282, when vacan-

cies exist on "must fill" jobs even though C(6) or C(7) men may be working blankable jobs?

Answer: (9-16-65) On the basis of the facts presented which indicate that no "must fill" jobs were operated without a fireman (helper), the carrier did have the right to furlough the firemen (helpers) who were hired subsequent to the effective date of the Award.

• • • • •

Question: 147. Certain carriers, including but not limited to Union Pacific and Birmingham Southern, are pursuing the practice of depriving C(3) firemen of jobs on vetoed assignments, and of jobs in passenger service and hostler service, which jobs they acquired by successfully bidding for them pursuant to the established bulletining practices that were in effect prior to the effective date of the Award. The C(3) firemen are being forced from the positions held by them, by the acts of the carriers compelling C(6) and C(7) firemen to leave blankable jobs held by them and to take the jobs held by the C(3) firemen. This practice is employed regardless of whether the C(6) and C(7) firemen are senior to the C(3) firemen or have less seniority than the C(3) firemen.

The carriers take the position that the practice described is authorized by the Award, and that C(3) firemen may be kept in a furloughed status after having been removed from jobs in the manner indicated until such time as all blankable assignments on a seniority district have been blanked, and vacancies have developed on vetoed assignments and in passenger service and hostling service which must either be filled by hiring new firemen or by calling the C(3) firemen back to service.

The Brotherhood takes the position that the foregoing practice is contrary to the employment rights given C(3) firemen by Parts C(3) and D(1) of the Award, and that C(3) firemen have the right to continue to hold jobs which

they properly acquired regardless of whether they are junior or are senior to the C(6) and C(7) firemen, until such time as the assignments held by the C(3) firemen have become vacated in a manner consistent with the rules that were in effect on the day preceding the day the Award became effective.

The Board's answer to BLF&E Question No. 65 is not sufficiently specific to eliminate disagreement and dispute on this subject.

Answer: (2-20-66) The Brotherhood's position is not correct. (Employees Dissent)

* * * * *

Carriers' Questions

SECTION II—PART C(2)

* * * * *

Question: 2. Part C(2) provides the separated employee "shall be entitled to a lump sum separation allowance in an amount to be determined as provided in Section 9 of the Washington Job Protection Agreement of May 21, 1936." Section 9 of the Washington Job Protection Agreement provides—

"(b) One month's pay shall be computed by multiplying by 30 the daily rate of pay received by the employee in the position last occupied prior to time of coordination."

It is the carriers' understanding that "prior to time of coordination" would, in the application of C(2), be related to the effective date of the Award, or January 25, 1964, and that, accordingly, the separation allowance would be computed on the basis of the rate of the job the employee last worked prior to January 25, 1964. Is the carriers' understanding correct?

Answer: (6-9-64) The separation allowance should be computed on the basis of the daily rate of pay received by

the employee on the last date service was performed prior to the date of the notice of separation from service.

Question: 3. It is the carriers' understanding that firemen employed subsequent to January 25, 1964 are covered by Part C(2) of Section II of the Award in that they are "Firemen (helpers) hired on or after a date 2 years prior to the effective date of this Award * * * .", and that, consequently, they may be separated from the carrier's payrolls but will be entitled to the separation allowance specified in C(2). Is the carriers' understanding correct?

Answer: (6-9-64) Yes, subject to the Answer to Carriers' Question #2—Section II, Part C(2) immediately above.

* * * * *

SECTION II—PART C(3)

* * * * *

Question: 5. It is the carriers' understanding that, under Part C(3), the employee may not elect to separate himself from the service of the carrier and collect the severance allowance, but that, rather, the election of the employee to remain on the seniority lists as prescribed in C(3) is conditioned upon the prior exercise of a prerogative on the part of the carrier. Is the carriers' understanding correct?

Answer: (6-9-64) The carriers' understanding is correct. The carrier has the right to decide if and when a C(3) fireman may be separated from the service. In the event the decision is made to terminate the employment of such C(3) fireman, he may then exercise the option available to him under Section II Part C(3) of the Award.

Question: 6. It is the carriers' understanding that the individual carriers may exercise their prerogatives under Part C(2) or C(3) at any time during the effective period of the Award. Is the carriers' understanding correct?

Answer: (6-9-64) Yes. The carriers' understanding is correct.

Question: 7. It is the carriers' understanding that C(3) firemen (helpers) who elect to remain on the seniority lists of the carrier have rights only to non-blankable jobs. Is the carriers' understanding correct?

Answer: (4-14-65) Yes. The carriers' understanding is correct. See answer to BLF&E Questions 15 and 65. (Employees Dissent)

* * * * *

Questions Re Southern Pacific Company

(Submitted by the Carrier and BLF&E)

* * * * *

Question: 1(e). Southern Pacific Question. It is the carrier's understanding that a blankable fireman (helper) position which has been blanked by a carrier may remain blanked and need not be made available to a C-6 or C-7 fireman (helper) assigned to the extra list or extra board. Is the carrier's understanding correct?

Question: SP-2. BLF&E. The Brotherhood takes the position that the Award does not authorize the carrier to operate a position, which it has declared "blanked", without a fireman (helper) when one is available on the extra list, if the failure to do so will cause a fireman (helper) on the extra list to lose a day or more of work. Is the Brotherhood's position correct?

Answer: (5-6-65) These questions are covered by the Board's answers to BLF&E Questions 60(b) and 76.

Clarification of Southern Pacific Question 1(e) and BLF&E SP-2 (6-30-65)

In response to the request of the BLF&E, the Board clarifies its answer to Southern Pacific Question 1(e) and BLF&E Question 2, as follows:

These questions are covered by the Board's answers to BLF&E Questions 60(b) and 76. The principle expressed in the Board's answer to Question 60(b) is that if there is

a vacancy on a "blankable" assignment, a C-6 or C-7 fireman-helper must be called to fill that vacancy if he would otherwise lose a day or more of work. As the Board stated in answering Southern Pacific Question 1(c), a position that has been "blanked" has been discontinued or abolished. Hence there cannot be a vacancy on a "blanked" assignment. Application of the principle of 60(b) to Question 76 means that the carrier may not operate a "blankable" assignment without a fireman-helper when C-6 or C-7 firemen-helpers are available on the extra board and may lose one or more days of work if not called to perform service, but may operate a "blanked" assignment under these circumstances.

It is contemplated by the Board, however, that in determining whether to blank a job or re-establish a blanked job, the carrier shall be governed by the principle that men on the extra board shall have work opportunity reasonably comparable to that afforded men on the extra board prior to the Award.

Nothing in the Board's Award nor in any interpretations issued thereunder, including the Board's answers to BLF&E Questions 60(b) and 76, was intended to work an undue forfeiture upon C-6 or C-7 firemen-helpers on extra boards. Similarly, it was never contemplated that any carrier should be allowed to compel a C-6 or C-7 fireman-helper to transfer to an extra board when the predictable result would be to impose upon him an undue forfeiture. The question of what constitutes an undue forfeiture must be determined by the facts of the specific case. (Employees Dissent)

[Filed May 12, 1966]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

• • • • •
Civil Action No. 777-66
Civil Action No. 784-66

Judgment

Civil Action No. 784-66 having been transferred to this Court by the United States District Court for the Northern District of Illinois; the said action having been consolidated by this Court with Civil Action No. 777-66; answers and counterclaims having been filed by the respective defendants in each of the said actions and answers to the counterclaims having been filed by the respective plaintiffs in the said actions; the respective parties on both sides having requested, among other things, a declaratory judgment and injunctive relief; a trial of the issues raised by the respective claims for a declaratory judgment and injunctive relief having been set for May 4, 1966; the parties having entered into a Stipulation (dated April 30, 1966) as to the evidence to be offered and the issues to be submitted at said trial; the trial having been held on May 4, 1966 and oral argument having been heard at that time; and the Court upon due deliberation having issued its Opinion (dated May 9, 1966) and having directed therein that the Stipulation by the parties shall constitute its findings of fact and the said Opinion shall constitute its conclusions of law,

IT IS HEREBY ORDERED, DECLARED, ADJUDGED AND DECREED:

1. The Interstate Railroad is dismissed as a party to this consolidated proceeding, pursuant to the oral motion on May 4, 1966 by its counsel and by counsel for the Brotherhood of Locomotive Firemen and Enginemen. The remaining plaintiffs in Civil Action No. 777-66, including those named as defendants in Civil Action No. 784-66, hereinafter

are referred to as the "railroads." The Brotherhood of Locomotive Firemen and Enginemen, which is the defendant in Civil Action No. 777-66 and the plaintiff in Civil Action No. 784-66, hereinafter is referred to as the "BLF&E."

2. A railroad and its employees represented by the BLF&E were subject to Public Law 88-108 and the Award by Arbitration Board No. 282 thereunder if the railroad either served the BLF&E with the Section 6 notice of November 2, 1959 (referred to in paragraph 6 of the Complaint in Civil Action No. 777-66 and in paragraph 11 of the Complaint in Civil Action No. 784-66) or was served by the BLF&E with the Section 6 notice of September 7, 1960 (referred to in paragraph 8 of the Complaint in Civil Action No. 777-66 and in paragraph 12 of the Complaint in Civil Action No. 784-66), or both, and either notice remained outstanding throughout the period prior to the enactment of Public Law 88-108. All of the railroads and their employees represented by the BLF&E, consequently, were subject to Public Law 88-108 and the Award issued thereunder, including the railroads referred to in paragraphs 1 through 4 of Section I-C of the Stipulation (except to the extent that the application of the Award on the railroads referred to in paragraphs 1, 3, and 4 of Section I-C of the Stipulation was modified by the agreements entered into by such railroads and the BLF&E and attached as Exhibits A, B, D, E and F to the Stipulation, which agreements remain in full force and effect).

3. The period during which Section II of the Award by Arbitration Board No. 282 "shall continue in force," as provided in Section IV of that Award pursuant to Section 4 of Public Law 88-108 and as extended by agreement, expired at 12:01 A.M. on March 31, 1966.

4. After the expiration of the Award, the railroads cannot terminate the employment of firemen (helpers) pursuant to the provisions of Paragraphs C(2), C(3), C(4) or C(6) of Section II of the Award and cannot offer compa-

able jobs to firemen (helpers) pursuant to the provisions of Paragraph C(6) of Section II of the Award.

5. The rules governing the use of firemen (helpers) in effect prior to the enactment of Public Law 88-108 were not restored upon the expiration of the Award. Subject to the provisions of paragraph 4 above, the modifications in those rules made by Section II of the Award and actions taken thereunder created a new status which is to be maintained after the expiration of the Award until changed by agreement or until the procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) have been exhausted with respect to valid notices served under Section 6 of that Act (45 U.S.C. § 156) proposing changes in the status thus created. Unless otherwise agreed to by the parties, the railroads need not use firemen (helpers) on engines (other than steam powered) in freight and yard service except as required by the Award, including those provisions of the Award governing the rights of individual firemen (helpers) retained in engine service. Such individual firemen (helpers) shall continue to enjoy the protections of their rights to work which are provided in the Award, but the railroads need not hire a replacement for an individual fireman (helper) who retires, is discharged for cause or is otherwise removed from a railroad's active working list of firemen (helpers) by natural attrition, unless a replacement is needed to fill a position which was not subject to being abolished under the Award.

6. Those individuals who accepted offers of comparable jobs pursuant to Paragraph C(6) of Section II of the Award may continue in those jobs with the guarantees provided by the Award, but the railroads are not required to restore such individuals to fireman (helper) positions. Those individuals who were separated from employment by the railroads pursuant to the Award may retain the separation allowances paid to them in connection therewith, but the railroads are not required to restore such individuals to employment as firemen (helpers).

7. Notices of proposed changes in rules governing the use of firemen (helpers) as modified by the Award or actions under the Award served under Section 6 of the Railway Labor Act during the effective period of the Award were premature and could not become effective under Section 6 of the Railway Labor Act until the day after the expiration of the Award. This ruling applies to the notices served by the BLF&E upon certain of the railroads referred to in Section I-K of the Stipulation and to the notices served by certain of the Railroads upon the BLF&E referred to in Section I-S of the Stipulation.

8. The parties serving or receiving the notices referred to in paragraph 7 above were under no obligation to confer, bargain or negotiate about the merits of the proposals made in those notices until after the notices became effective as provided in paragraph 7 above. The meetings described in Section I-L of the Stipulation, at which the railroads denied any obligation to negotiate about the merits of the proposals served by the BLF&E, did not constitute "conferences" within the meaning of Sections 5 and 6 of the Railway Labor Act (45 U.S.C. §§ 155, 156), and did not fulfill the requirement for conferences imposed by those Sections. Recourse to the National Mediation Board may be had only after the notices became effective and after conferences fulfilling the requirements of Sections 5 and 6 of that Act are commenced. The applications by the BLF&E for mediation, referred to in Sections I-N through I-Q of the Stipulation, therefore were premature and do not become effective until after conferences fulfilling the requirements of Sections 5 and 6 of the Railway Labor Act are commenced.

9. Those aspects of the proposals (referred to in Section I-K of the Stipulation) served by the BLF&E upon certain of the railroads which were identified as "Notice No. 1" and "Notice No. 2" are invalid, and the railroads have no obligation to confer, bargain, negotiate, participate in mediation or otherwise participate in procedures under the Rail-

way Labor Act at any time with respect to the said aspects of the proposals served by the BLF&E. This Judgment does not determine any issue as to whether the railroads have an obligation after the expiration of the Award to confer, bargain, negotiate, participate in mediation or otherwise participate in procedures under the Railway Labor Act with respect to that aspect of the proposals served by the BLF&E identified as "Notice No. 3," and is without prejudice to the rights of any party in that regard.

10. The Brotherhood of Locomotive Firemen and Enginemen, each of its lodges, divisions, locals, officers, agents and employees, and all persons acting in concert with them, are hereby permanently enjoined from authorizing, calling, encouraging, permitting or engaging in any strikes or work stoppages and from picketing the premises of any of the railroads over: (1) the failure or refusal of a railroad or railroads to restore or reinstate after the expiration of the Award by Arbitration Board No. 282 the rules in effect prior to that Award or to the enactment of Public Law 88-108; (2) the maintenance and application by a railroad or railroads pursuant to paragraph 5 above of the modifications made by the Award and actions taken thereunder in the rules in effect prior to the Award or to the enactment of Public Law 88-108, until such time as the status created by such modifications is changed by agreement or the procedures of the Railway Labor Act have been exhausted with respect to valid Section 6 notices proposing changes in that status; (3) the failure or refusal of a railroad or railroads pursuant to paragraph 5 above to use firemen (helpers) on engines (other than steam power) in freight and yard service except as required by the Award, or to hire replacements for individual firemen (helpers) who retire, are discharged for cause or otherwise are removed from a railroad's active working lists of firemen (helpers) by natural attrition; (4) the failure or refusal of a railroad or railroads to restore or reinstate as firemen (helpers) individuals who were separated from employment or given comparable jobs pursuant

to the Award; (5) the failure or refusal of a railroad or railroads to confer, bargain, negotiate, participate in mediation or otherwise participate in procedures under the Railway Labor Act with respect to those aspects of the proposals served by the BLF&E identified as "Notice No. 1" and "Notice No. 2" declared to be invalid in paragraph 9 above, or the failure or refusal of a railroad or railroads to accept those aspects of the proposals; (6) the failure or refusal of a railroad or railroads prior to the expiration of the Award to confer, bargain, negotiate or participate in mediation with respect to that aspect of the proposals served by the BLF&E identified as "Notice No. 3," or the failure or refusal of a railroad or railroads to accept that aspect of the proposals until such time as conferences and mediation have been had as provided in paragraph 8 above and the procedures of the Railway Labor Act otherwise have been exhausted; or (7) any other actions by a railroad or railroads, or failures or refusals to act, which are authorized by this Judgment.

11. The court reserves jurisdiction of the proceedings claiming contempt referred to in Section II-C of the Stipulation, and this Judgment is without prejudice to the rights of any of the parties in such proceedings except insofar as issues which may be relevant thereto have been decided herein. The Court also reserves jurisdiction of the counterclaim for damages referred to in Section II-D of the Stipulation, and this Judgment is without prejudice to the rights of the parties with respect to the said counterclaim except insofar as issues which may be relevant thereto have been decided herein.

12. The Court reserves jurisdiction for the purpose of enabling any of the parties to this proceeding, or any person that may be or may hereafter become bound in whole or in part by this Judgment, to apply to this Court at any time for such further orders as may be necessary or appropriate for the construction, carrying out or enforcement of this Judgment.

13. The Court having determined that there is no just reason for delay, it hereby directs pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that this Judgment be entered as a final judgment of the claims by the respective parties for a declaratory judgment and injunctive relief without costs.

Dated: May 12, 1966.

/s/ ALEXANDER HOLTZOFF
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 784-66

Notice of Appeal

Notice is hereby given this 8th day of March, 1967, that Plaintiff, Brotherhood of Locomotive Firemen and Engineers, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 10th day of February, 1967 in favor of Defendants against said Plaintiff.

/s/ ISAAC N. GEONER
Attorney for Plaintiff

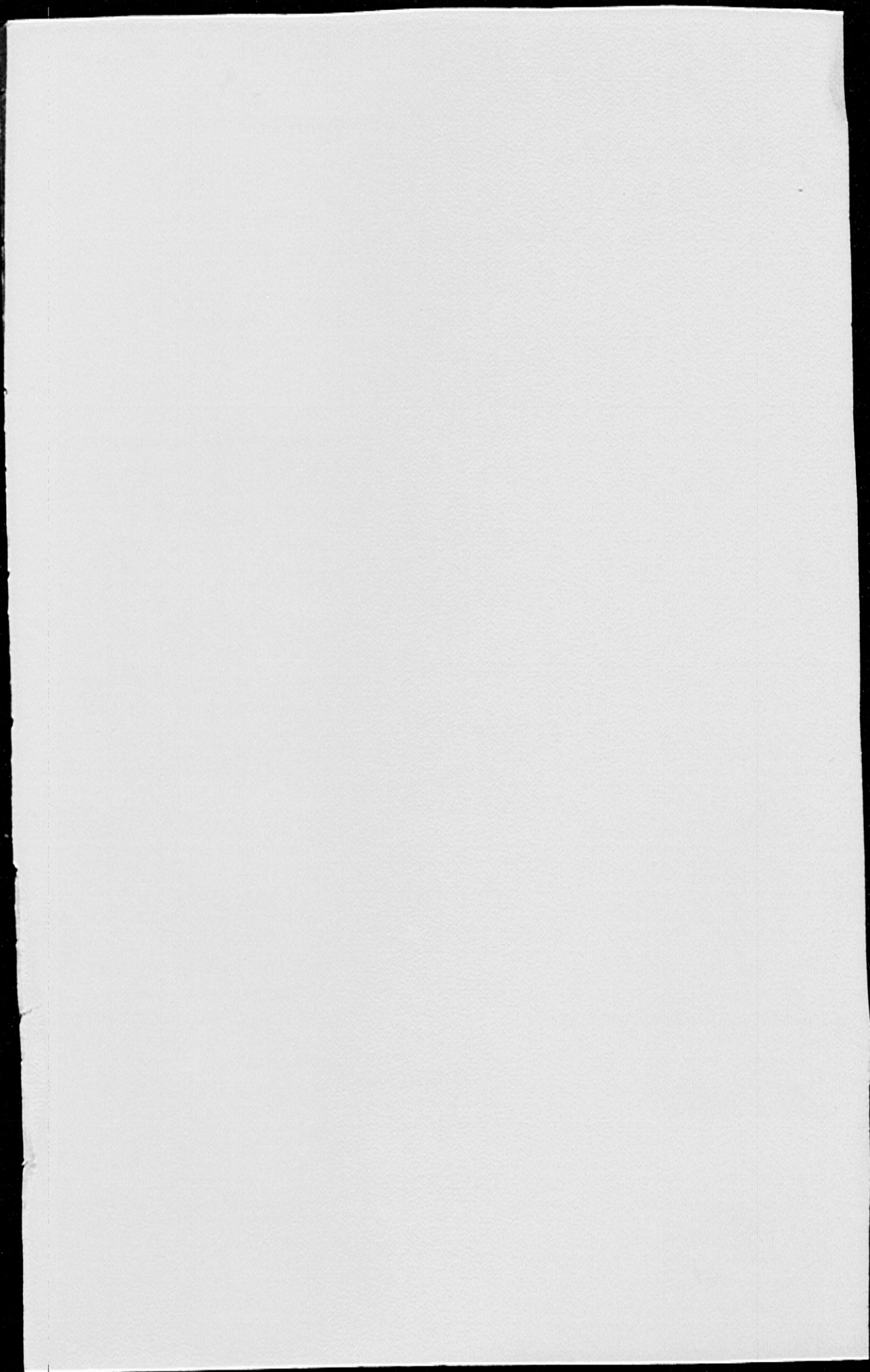
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 777-66

Notice of Appeal

Notice is hereby given this 8th day of March, 1967, that Defendant, Brotherhood of Locomotive Firemen and Enginemen, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 10th day of February, 1967, in favor of Plaintiffs against said Defendant.

/s/ ISAAC N. GEONER
Attorney for Defendant



BRIEF OF APPELLANT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEERS, *Appellant,*

v.

BANGOR AND ARROSTOOK RAILROAD
COMPANY, ET AL., *Appellees.*

No. 20,909

BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEERS, *Appellant,*

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
Appellees.

No. 20,910

Appeal From the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 5 1968

Nathan J. Paulson
CLERK

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STATEMENT OF QUESTIONS PRESENTED

Congress provided in Public Law 88-108 (1963) for the compulsory arbitration of locomotive firemen manning issues, specifying that the Award was to be effective for only a limited lifetime of two years. The Award expired on March 31, 1966.

1. The Award established a procedure effective during its lifetime permitting the carriers to abolish a certain percentage of firemen positions on diesel yard locomotive engine crews, with the express proviso "that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition." On yard crews and assignments on locomotives which the carrier did not equip with a deadman control in good operating condition during the lifetime of the Award, is a fireman required after the Award? *

2. Does the National Railroad Adjustment Board have any jurisdiction over disputes as to firemen manning rules effective after the expiration of the Award?

* Appellant believes this should be answered in the affirmative; accordingly, it would not be necessary to face the question whether firemen who were actively employed as of the expiration of the Award may be furloughed thereafter, which question is not waived; see page 14, n., *infra*.

Throughout this Brief, the term "fireman" or "firemen" refers to firemen, firemen (helpers) and all classifications of employees other than engineers covered by collective bargaining agreements between Appellant and any of the Appellees.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN, *Appellant,*

v.

BANGOR AND AROOSTOOK RAILROAD
COMPANY, ET AL., *Appellees.*

No. 20,909

BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN, *Appellant,*

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
Appellees.

No. 20,910

Appeal From the United States District Court for the
District of Columbia

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The consolidated actions from which the instant Appeals arise are the same District Court actions which were before this Court in Appeals Nos. 20,192, 20,193, 20,215 and 20,216, decided in *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, 128 App. D.C. —, 385 F. 2d 581 (1967),

cert. denied, 390 U.S. 923 (1968). The basic pleadings appeared in the Joint Appendix in those Appeals and have not been reprinted in the Joint Appendix herein ("JA" hereinafter).

The jurisdiction of the District Court rested on 28 U.S.C. §§ 1331 and 1337. The Order involved in this case, that of February 10, 1967, was a final judgment as to the matters involved therein and denied the injunctive relief requested by the BLF&E (JA 34). This Court, accordingly, has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1).

STATEMENT OF THE CASE

This case presents particular facets of the issues relating to the manning of diesel locomotive crews with firemen which were generated by the unprecedented compulsory arbitration required by Public Law 88-108 (1963), 77 Stat. 132, 45 U.S.C. following §157, and effectuated in the Award of Arbitration Board 282 ("Award" hereinafter), and by the expiration of the firemen manning provisions of the Award on March 31, 1966. Appellant, Brotherhood of Locomotive Firemen and Enginemen ("BLF&E" hereinafter) represents the firemen employed by Appellee carriers for purposes of collective bargaining. The background and general legal consequences of the Public Law and the expiration of the Award are elucidated, so as to require only minimum statement herein, in *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, 128 App. D.C. —, 385 F. 2d 581 (1967), *cert. denied*, 390 U.S. 923 (1968) ("Akron" hereinafter).

In general, that decision adjudicated the consequences of the Award and its expiration on the firemen manning rules which had been followed both prior to and during the Award. Prior to the Award, pursuant to the collectively bargained National Diesel Agreement, a fireman was required on every freight or yard locomotive, with exceptions

not pertinent here. In essence, Part II of the Award established a procedure for reducing the number of firemen positions consisting of each carrier's first listing the firemen positions which it believed could be eliminated, with due regard for safety and other pertinent considerations; and then each BLF&E General Chairman's vetoing ten percent of the carrier-listed positions (JA 35-37). This procedure was directed only to positions and not to firemen. For the firemen themselves, the Award established individual rights based upon length of service: employment until natural attrition for those firemen with over 10 years service; offer of a comparable job with a guaranty of at least 5 years employment for those with 2-10 years of service; and separation compensation for other firemen (JA 38-42). Accordingly, at the expiration of the Award, there were many firemen actually employed on engine crews on which the firemen positions had been eliminated on paper pursuant to the procedures of the Award.

This Court in *Akron* decided that the expiration of the Award terminated the procedures established by the Award (385 F.2d at 609-611). With respect to the engine crews for which the procedures had not been validly completed, however, in particular new runs created after the expiration of the Award, the Court ruled that the National Diesel Agreement was restored into effect upon the expiration of the Award. A fireman was required on each such engine crew (*id.* at 611).

Akron involved Appeals from the District Court Judgments as to the firemen manning and crew consist rules in effect after the expiration of the Award. As to the firemen manning issue, *Akron* reviewed only the District Court Judgment of May 12, 1966. The instant Appeals in these same consolidated District Court cases present carrier actions which occurred subsequent to the expiration of the Award and were adjudicated in the District Court Order of February 10, 1967 (JA 34) which was not involved in *Akron*.

The railroad action under review herein is the abolition of certain firemen positions, as to which the procedures provided by the Award had *not* been validly completed by the date of the expiration of the Award, and the consequent furloughing of firemen, by one of the carrier Appellees, Galveston Wharves. This carrier is the switching terminal which accomplishes the railroad connections between the docks at Galveston, Texas, and certain principal carriers, including the Southern Pacific, the Rock Island Railroad and the Santa Fe, thereby effectuating the rail connections with the entire country (JA 6, 19).

On January 3, 1967, Galveston Wharves posted a bulletin listing four regular eight-hour day, full-time, firemen jobs, which it proposed to abolish the very next day (JA 6-7, 11). All these jobs on engine crews were then filled by firemen and had been filled by firemen since prior to 1963 (JA 7). The ultimate result, upon the operation of seniority and the various consequent transfers of assignments, was to be the indefinite furloughing of three firemen (JA 8).

The consequence of being furloughed is that the fireman will no longer be employed by Galveston Wharves and will receive no compensation from it, unless and until he is recalled from furlough (JA 8). That will not occur until one of the regular locomotive fireman positions should become vacant through attrition, i.e., through some cause such as death or retirement (*ibid.*). Because the men were furloughed, they were not to receive any separation or severance allowance (*ibid.*).

The four firemen jobs in the bulletin had physically appeared on the list of firemen positions, filed by the carrier during the period of the Award; this was ostensibly in compliance with the listing-and-vetoing procedures for eliminating firemen jobs provided in the Award (JA 13). The listing of these firemen jobs was actually of no force or effect, however, because the Award made express reference to deadman controls as a proviso in the procedures; and the Arbitration Board made clear that this reference was deliberate and purposeful.

Part II-B of the Award, dealing with the reductions in jobs for firemen, includes the following proviso attached to the established procedures: "provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition" (JA 37). The Opinion of the Neutral Members of Arbitration Board 282 refers to "installing a dead-man control in all yard engines which our award requires as a condition precedent to the operation of such locomotives without a fireman." *Railroads v. Operating Brotherhoods*, 41 LA 673, 687-688 (1963). Further, the Neutral Members pointed out that "in respect to yard locomotives, the Presidential Railroad Commission recommended that no yard locomotive should be operated without a fireman unless and until it is equipped with a deadman control in good operating condition, and the carriers have indicated from the outset their willingness to accept that recommendation" (*id.* at 690).

All the firemen jobs appearing on the Galveston Wharves January 3, 1967 bulletin were in yard locomotive crews. None of the locomotives involved was equipped with deadman controls prior to the effective date of the Award (JA 13). Nor was any equipped with such controls at the expiration of the Award (*ibid.*). According to Galveston Wharves, deadman controls were ordered early in 1965, but because of various delays in delivery and imperfections of equipment, were not finally installed until December, 1966, approximately nine months after the expiration of the Award (*ibid.*).

To forestall the carrier from placing the bulletin into effect, the BLF&E filed motions for injunctive relief (JA 3-5). On January 13, 1967, when the motion for preliminary injunction was first heard, the District Court (Holtzoff, J.) indicated it would hold in favor of the BLF&E (JA 24-25). At that time, the District Court was concerned primarily with Paragraph 4 of its own May 12, 1966 Judgment, the Judgment which was the subject of *Akron*, which

declared that the carriers could not continue to terminate firemen and offer them comparable jobs and severance pay, in accordance with the Award, after the expiration of the Award (JA 52-53). This holding was expressly affirmed by this Court which said that "a carrier is * * * prevented from taking 'affirmative acts' under the Award to reduce the use of firemen, as the District Court properly held * * *." *Akron*, 385 F.2d at 611. In essence, the District Court held, on January 13, 1967, "The Court is of the opinion that to furlough a man whose employment cannot be terminated is in effect or in part a nullification of the tenure granted in paragraph 4 [of the May 12, 1966 District Court Judgment]" (JA 25). The effect of furloughing "may well be the same as an intentional avoidance of that prohibition [against termination] because the status of being furloughed may mean being without employment for an indefinite period. The Court is constrained to reach the conclusion that the men involved in this application may not be furloughed" (JA 25).

A few days later, on January 19, 1967, in the course of the hearing of a different case, not involving the BLF&E, Judge Holtzoff advised the counsel for the railroads that he was concerned that he had erred in his earlier decree, and in effect advised Galveston Wharves that a motion for rehearing would be granted (JA 26). The carrier did request reconsideration. On February 3, 1967, when the parties were before the District Court, in a hearing ostensibly scheduled in connection with the draft Order which the BLF&E had submitted pursuant to the favorable District Court holding of January 13, Judge Holtzoff first announced to the BLF&E that he believed he had made the wrong decision when he decided in favor of the BLF&E (JA 27-28). Finally, after permitting time for the BLF&E to submit argument on the basis of a motion for rehearing rather than settlement of an order, the District Court, on February 10, 1967, denied injunctive relief; and declared that carriers could furlough and also presumably

terminate firemen who had been hired subsequent to the date 2 years prior to the effective date of the Award (JA 28-31). For this turnabout holding, the Court below relied upon interpretations of the Award made by Board 282 while the Award was in effect (JA 30-31). Disregarding the fact that the Award had already expired, the District Court held, "the construction of the Award is binding on this Court and the Court therefore is constrained to deny the motion for supplemental relief" (JA 31).

The Court added, "This denial is, however, without prejudice to any administrative proceeding that may be brought before the National Railway [sic] Adjustment Board or before a local board created to handle such matters" (JA 31-32). Accordingly, the Court added to the proposed orders submitted by Galveston Wharves, that the motion for injunctive relief was denied "without prejudice to administrative proceedings" (JA 34).

This suggestion of a possible administrative forum was evidently based upon Judge Holtzoff's references to and provisions for administrative proceedings in a prior opinion and order, in September, 1966, involved in Appeals Nos. 20,472, 20,473 and 20,647, in which Appellant's Brief is also being filed at this time. The pertinent portion appears at JA 32-33, and is reported at *Bangor and Aroostook R. Co. v. Brotherhood of Loc. F. & E.*, 258 F. Supp. 346, 351 (1965). The District Court declared that the National Railroad Adjustment Board could provide an administrative remedy (*ibid.*).

STATUTES AND OTHER MATERIALS INVOLVED

The Award is set out in the Joint Appendix at 35-42, the deadman control provision appearing at 37.

Section 3 First (i) of the Railway Labor Act, 48 Stat. 1189, 45 U.S.C. § 153 First (i):

"3. First. There is established a Board, to be known as the 'National Railroad Adjustment Board', the

members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

“(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.”

STATEMENT OF POINTS

1. The District Court erred in failing and refusing to declare and adjudge that the work rule effective after the Award for every yard engine crew or assignment on which the locomotive was not equipped with a deadman control in good operating condition at the time of the expiration of the Award required a fireman on that particular crew or assignment; and that such work rule could not be changed by the installation of such equipment after the expiration of the Award.

2. The District Court erred in declaring, holding or implying that there is jurisdiction or propriety in any administrative proceeding to enforce or adjudicate rights arising out of or directly related to the judicial determinations of the rights and obligations of these parties as of the expiration of the Award.

3. The District Court erred in failing and refusing to declare and adjudge that after the expiration of the Award no carrier may furlough a fireman who was employed as of the expiration of the Award by abolishing or by discontinuing the fireman position which he then held.

SUMMARY OF ARGUMENT

I

This Court's holding in *Akron* with respect to Full Crew Law States governs the instant issue of the efficacy after the Award of a carrier's listing for abolition of fireman positions during the Award of yard locomotives which were not installed with deadman controls during the lifetime of the Award. This Court held that in a State which had a Full Crew Law as of the expiration of the Award—a State in which that Law was not repealed during the lifetime of the Award—the substantive work rule which became effective as of the expiration of the Award required a fireman on that yard locomotive crew. The carrier's listing of such crews during the Award had no legal effect. The repeal of the Full Crew Law *after* the Award had expired could not alter or affect the substantive work rule established as of the expiration of the Award.

The carrier's paper listing of that crew during the Award was no more than "conditional blanking [which] was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award." *Akron*, 385 F.2d at 611-612. Inasmuch as the repeal of the Full Crew Law, the necessary condition, had not materialized during the Award, the listing of the crew could not and did not change the substantive work rule which required a fireman on that crew. That rule and that requirement are applicable to the crew after the Award.

Identically, the equipment of yard locomotives with deadman controls as of the expiration of the Award was a necessary condition precedent to an effective listing of that fireman position during the Award. The Award expressly prescribed that "no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition" (JA 37). If that necessary condition did not ma-

terialize during the Award, the substantive work rule applicable to that crew after the Award required a fireman.

The yard locomotives involved in this case were unquestionably not equipped with any deadman controls in good operation condition as of the expiration of the Award. Such equipment was not installed until some nine months after the expiration of the Award. Manifestly, the substantive work rule applicable to these locomotives as of the expiration of the Award required a fireman. That substantive work rule continued in effect by virtue of the Railway Labor Act, in accordance with this Court's holding in *Akron*. Accordingly, the carrier had no right to abolish the positions involved.

II

The judiciary is the forum with jurisdiction to determine any dispute about the carrier's right to abolish these positions. The resolution of any such dispute hinges upon the presently effective basic substantive work rules with respect to firemen manning. These rules do not appear in the collective bargaining agreements of the parties as written and agreed to by the parties, but, after the Public Law and the Award, are now declared in *Akron*. A dispute about such rules is not a "minor" dispute, i.e., a dispute "growing out of grievances or out of interpretations or applications of agreements", which falls within and constitutes the jurisdiction of the National Railroad Adjustment Board by virtue of Section 3 First (i) of the Railway Labor Act, set out at pages 7-8, *infra*. That Board has no jurisdiction in the premises.

That Board has no particular expertise, and *a fortiori* lacks the expertise of courts, in interpreting judicial decisions such as *Akron*. Indeed, the Board has itself recognized its lack of jurisdiction over legal problems involving statutory or administrative interpretations and requiring judicial determination. The only expertise of the Board

lies in the area of interpreting and applying voluntary collective bargaining agreements in the railroad industry. Congress granted the Board jurisdiction solely in this area. But the disputes at bar do not concern the interpretation and application of contract provisions written by the parties and voluntarily agreed to by them. To the contrary, this dispute concerns basic firemen manning work rules upon which the parties have not agreed and which must hereafter be defined and established by judicial decisions. Accordingly, the judgment below that the Board has jurisdiction should be reversed.

ARGUMENT

I

THE WORK RULE AS TO FIREMEN MANNING APPLICABLE TO CREWS AND ASSIGNMENTS ON YARD LOCOMOTIVES WHICH DID NOT HAVE A DEADMAN CONTROL IN EFFECTIVE OPERATING CONDITION AS OF THE EXPIRATION OF THE AWARD IS THAT SUCH CREWS AND ASSIGNMENTS REQUIRE A FIREMAN AFTER THE AWARD.

In *Akron*, this Court held that a carrier's paper listing for abolition of a fireman position, purportedly pursuant to the Award, on an engine crew operating in a State with a Full Crew Law requiring a fireman on that crew was legally ineffective during the Award to wreak any change in the substantive work rule applicable to that crew. In such a case, a fireman had been required before as well as during the Award, and this Court held a fireman is required after the expiration of the Award despite subsequent repeal of the Full Crew Law. The force and rationale of this holding must necessarily apply to the paper listing by a carrier of engine crews on yard locomotives lacking effective deadman controls. Identically, a fireman was required before as well as during the Award on such crews, and therefore is required after the expiration of the Award despite subsequent installation of the required controls.

As to the Full Crew Law States, this Court held:

"Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its life time was the fact that the change was blocked by a state's full crew law. The Supreme Court has expressly held that while such state law was in effect the Board had no capacity to make a change contrary to its provisions. See *Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R. R.*, 382 U.S. 423, 86 S.Ct. 594, 15 L.Ed.2d 501 (1966). The opening sections of the Award dealing with the use of firemen and with crew consists provided for the continuation of work rules, however established, unless changed pursuant to the Award. The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.

"The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. The Court noted in *Rock Island*, *supra*, 382 U.S. at 433, 86 S.Ct. at 599:

'Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full crew laws.'

"The Board authorized the carriers to list jobs for blanking, and thus provide a classification 'when and if such full crew laws are amended or repealed.' Answer of May 17, 1964, to Carriers' Question No. 5 under Section II-Part B(1) and B(2). But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. See Opinion of Neutral Members, quoted *supra*, 41 Lab. Arb. at 681. The Board's energy was not limited to 'the dispute which was before it [Congress]' at the passage of the law, but also extended to firemen man-

ning disputes arising during the critical 2-year period. But the Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period." *Akron*, 385 F.2d at 611-612.

Identically, the listing of a yard crew which did not have deadman controls was "conditional blanking [which] was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award." Part II-B of the Award, in establishing the procedures for reduction in firemen jobs, expressly inserted the proviso "that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition" (JA 37). The clear and unmistakable significance of this language is that the listing of a yard locomotive *not* equipped with a deadman control in good operating condition is an *invalid* listing. It remains invalid at least for the duration of the period when the specified safety equipment is lacking. The carrier's mere listing of that crew, without its accomplishing the prescribed safety installations, cannot take effect to deprive a fireman on that locomotive of his position.

As the Neutral Members of Board 282 made clear, "our award requires as a condition precedent to the operation of such locomotives without a fireman" the "installing [of] a dead-man control in all yard engines * * *." *Railroads v. Operating Brotherhoods*, 41 LA 673, 687-688 (1963). The inclusion of the proviso was manifestly purposeful.

In order to enforce its plain meaning, in accordance with its deliberate and express inclusion in the Award, the proviso must be held to mean that a yard crew could not be and was not affected by the procedures established in the Award, if that yard crew had no deadman control in good operating condition on its locomotive at the time the Award expired. As in the case of the Full Crew Law

State, the "necessary condition" for effectuating the abolition of that fireman position—a deadman control in good operating condition—had not "materialized during the 2-year lifetime of the Award." *Akron*, 385 F.2d at 612.

A fundamental holding of this Court in *Akron* was that the substantive work rules in effect on the last day of the Award continued in effect, by force of the Railway Labor Act, until changed in conformity with that Act. In contrast to the substantive rules, the procedures established in the Award ceased to have any legal effectiveness after the termination of the Award. As this Court expressly declared, "when the Award expired, so did the procedures it suggested. What survives is the complex of work rules in force on the last day prescribing the substantive terms that control the use of firemen on individual runs." *Akron*, 385 F.2d at 610. Accordingly, "if the carrier was required to keep a fireman on a particular crew as of the last date of the Award, it cannot thereafter change the work rule * * * except by agreement or in accordance with Section 6 [of the Railway Labor Act]" (*id.* at 611).

Beyond any doubt whatever, Galveston Wharves was required to keep a fireman on these particular yard engine crews as of the last day of the Award. Inasmuch as there is no dispute whatever about the fact that the yard locomotives involved did *not* have deadman controls in good operating condition as of the expiration of the Award, it follows ineluctably by virtue of *Akron* that the work rule governing these crews after the expiration of the Award required the inclusion of a fireman. The District Court therefore committed clear error in permitting the abolition of these firemen positions* and the consequent furloughing

* Inasmuch as the carrier had no right to abolish these jobs and the firemen involved herein should therefore not have been furloughed, there is no need to reach the question whether in any event firemen who were actively employed as of the expiration of the Award may be furloughed thereafter; in particular, whether the District Court was correct on January 13, 1967, when it held there was no such right, or on February 10, 1967, when it

of the firemen involved in this case; and in denying the BLF&E appropriate declaratory and injunctive relief. This Judgment of the District Court thus cannot stand and must be reversed.

II

THE NATIONAL RAILROAD ADJUSTMENT BOARD HAS NO JURISDICTION OVER DISPUTES AS TO FIREMEN MANNING RULES EFFECTIVE AFTER THE EXPIRATION OF THE AWARD.

As the foregoing discussion demonstrates, the substantive firemen manning issues at bar must be resolved, as were the issues in *Akron*, by reference to the provisions and legal intendment of the Public Law, the Award and the Railway Labor Act. Such legal issues have been and can be adjudicated only in the judicial forum.

Nevertheless, the Court below held there were administrative proceedings available before the National Railroad Adjustment Board ("NRAB" hereinafter). This holding is clearly erroneous. The NRAB has no jurisdiction in the premises.

The jurisdiction of the NRAB extends only to "disputes between an employee or a group of employees on a carrier

declared such right did exist. Should this Court not agree with our position on the abolition of these jobs, however, and face the general question of furlough, *Akron* is dispositive that the carriers have no right to subject firemen to involuntary furlough after the Award.

In the context in which this question arose below, the governing provision was Paragraph 4 of the District Court Judgment of May 12, 1966, which prohibited the carriers from terminating the employment of firemen after the Award. This Paragraph reflected the declaration in the opinion of the District Court that "neither side may take any affirmative steps under the Award after its termination date. Thus, the railroads may not discharge any more firemen pursuant to the provisions of the Award." *Bangor and Aroostock [sic] R. Co. v. Brotherhood of Loc. F. & E.*, 253 F.Supp. 682, 686 (1966); and *id.* at 689. Accordingly, when the furlough question arose, the initial judgment of the District Court, on January 13, 1967, was that "to furlough a man whose employment cannot be terminated is in effect or in part a nullification of the tenure granted in paragraph 4" (JA 25). The District Court recognized that "the effect [of furlough] may well be the same as an intentional avoidance of that prohibition [against termination

or carriers growing out of grievances or out of the interpretation or application of a grievance concerning rates of pay, rules, or working conditions * * *." 45 U.S.C. § 153 First(i). This jurisdiction is commonly referred to as jurisdiction over "minor disputes"—"generally speaking,

in paragraph 4] because the status of being furloughed may mean being without employment for an indefinite period" (*ibid.*).

On February 10, 1967, however, the Court below held that furlough was permissible, basing its turnabout solely on interpretations of the Award which Arbitration Board 282 had rendered while the Award was still in effect (JA 30-31). In the light of *Akron*, the District Court was manifestly in error on February 10 and correct in its January 13 proscription of furlough as an affirmative act which the carriers could not take after the Award. This Court expressly declared in *Akron* that "the District Court properly held" that a carrier after the Award is "prevented from taking 'affirmative acts' under the Award to reduce the use of firemen * * *." *Akron*, 385 F.2d at 611.

As the District Court recognized, furlough has the identical force and impact as termination. The affirmative action by the carrier in both cases produces the identical practical result of removing the subject fireman from the carrier's payroll. That fireman and his family are immediately and directly deprived of their livelihood and means of support. There is no further income; and there are only the vaguest and most unpredictable possibilities of ever being again employed in the railroad industry (JA 8-10, 25).

In reality, there is no significant distinction between indefinite, involuntary furlough and termination. Furloughing a fireman is carrier action against the subsisting employment status of a fireman which is no less affirmative than termination. Inasmuch as termination is concededly unauthorized and improper after the Award, furlough is likewise illegal.

While the District Court recognized that furlough was affirmative action, it nevertheless finally upheld the right of carriers to furlough firemen after the Award, believing itself bound by interpretations of Arbitration Board 282, even though the Award had expired. But this Court has now expressly made clear that "the Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period." *Akron*, 385 F.2d at 612 (emphasis added). Manifestly, the instant disputes, relating solely to the rights and obligations of the parties after the expiration of the Award, were not in being and could not possibly have been projected as arising during the circumscribed 2-year period of the Award.

Accordingly, the District Court declaration that the carriers may furlough firemen after the Award cannot be sustained. If this Court should consider the furlough issue, therefore, the Order below should be reversed on that ground also.

disputes relating to construction of a contract * * *." *Locomotive Engineers v. M.-K.-T. R. Co.*, 363 U.S. 528, 531 (1960). Congress entrusted resolution of such disputes to the NRAB as an administrative agency with expertise in the interpretation of "provisions in railroad collective bargaining agreements [which] are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application." *Pennsylvania R. Co. v. Day*, 360 U.S. 548, 553 (1959).

Disputes over interpretation of agreements—minor disputes—"may be contrasted with 'major disputes' which result when there is disagreement in the bargaining process for a new contract." *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 33 (1957). This case, like *Akron*, does not involve disputes relating to the construction of collective bargaining agreements. To the contrary, these disputes result ultimately from the disagreement in the bargaining process which led to the Award and thence the expiration of the Award, and which certainly was a major dispute. *Locomotive Engineers v. B. & O. R. Co.*, 372 U.S. 284 (1963).

Akron and this case concern the definition and exposition of the substantive work rules which became effective at, and bound the parties after, the expiration of the Award. These rules are the underlying manning rules, the fundamental rights and obligations of the parties with respect to these major working conditions. These are the basic firemen manning work rules to which these parties must adhere in the future.

These rules now are set forth in *Akron*, and only in *Akron*. Because of the intervention of Public Law 88-108 and the Award suspending the voluntarily bargained labor agreements, neither party clearly knew or could have known which work rules were to be effective after the expiration of the Award, until there was a judicial adjudication. In fact both sides instituted Court suits for a

declaration of their rights after the Award. In law those rights were not settled nor the disputes over them resolved, until this Court spoke, and the Supreme Court denied certiorari, in *Akron*.

The disputes at bar do not arise out of, and cannot even be understood by reference to, the collective bargaining agreement between the parties. They arise out of the expiration of the Award, and are governed by *Akron*. Obviously, this Court has expertise in adjudicating the legal issues, centrally involving the interpretation and application of the Railway Labor Act, relating to the rules and procedures to be in effect after the Award; and this Court has the paramount and exclusive expertise in the interpretation of *Akron*. Over such issues and disputes the NRAB has no expertise or competence whatever.

This Court has held that the NRAB had no particular competence or jurisdiction over disputes arising during the Award as to whether the carriers were affording firemen the various rights granted them in the Award. *Southern Pacific Co. v. Brotherhood of Loc. Fire. & Eng.*, — App. D.C. —, 393 F. 2d 345 (1967), *cert. denied*, 88 S.Ct. 1803 (1968).^{*} Inasmuch as the NRAB had no competence

^{*} In denying the carriers' petition for rehearing which was based upon an alleged inconsistency with *Akron*, this Court, *inter alia*, noted the inequity of requiring the exhaustion of the NRAB administrative remedy:

"Furthermore, there is sound equitable basis for omitting the claims-and-grievance procedure established in 1948 and 1949 agreements, even assuming its applicability. Concepts of exhaustion of remedies will not be pursued with remorseless logic, at least in situations not fairly contemplated when the remedies were established, when the consequence would contravene basic expectations of justice by mandating a futile or unduly protracted procedure. *United Protective Workers v. Ford Motor Co.*, 194 F.2d 997, 10002 [sic] (7th Cir. 1952); *United Protective Workers, Local No. 2 v. Ford Motor Co.*, 223 F.2d 49, 51, 48 A.L.R. 2d 1285 (7th Cir. 1955).

"In this case the carriers are in effect urging that issues fully considered at pertinent top levels of management and labor are subject to an objection for failure to pursue remedies provided at lower levels even though the obvious purpose of those remedies was to winnow out

or jurisdiction over rights and obligations established in the compulsory *arbitration* Award, it *a fortiori* has no competence or jurisdiction over the far broader, much more obviously legal issues presented by adjudication of the rights and obligations of the parties after the Award established *judicially* by interpretation of the Railway Labor Act. The teaching of *Southern Pacific*, in which this Court faced a related issue of jurisdiction as between the NRAB and the judiciary, militates for the conclusion that the judiciary, and not the NRAB, has jurisdiction over the essentially legal issues involved in this case.

The NRAB has acknowledged its own lack of jurisdiction over issues of statutory interpretation and the limitation of its own jurisdiction exclusively to the interpretation of collective bargaining agreements. In *Duluth Missabe and Iron Range Railway Co.—Brotherhood of Railroad Trainmen*, 137 NRAB 199, 137 NRAB 220 (1st Div. 1958), for example, the NRAB had before it employees' claims grounded upon the failure of the carrier to restore service in accordance with a decision of the Minnesota Supreme Court upholding the order of the Minnesota Railroad and Warehouse Commission. The carrier successfully argued that the NRAB did not have jurisdiction to decide whether it had complied with the Minnesota administrative and judicial orders. In accepting this carrier contention, the NRAB found, "The Division is without jurisdiction to decide whether the carrier did or did not comply with the

the issues that need not come to the top. Exhaustion under such circumstances would be a long circuit bypassing the practical and the just." 393 F.2d at 348 (footnote excluded).

When the identical claims-and-grievance procedure was established in the 1948 and 1949 agreements, the parties obviously did not contemplate the manifold events that would overtake them more than 15 years later, in 1963 and thereafter—the Award, the expiration of the Award, and the *Akron* decision and other litigation regarding the rights and obligations of the parties after the Award. These critical events certainly were "not fairly contemplated when the remedies were established." *A fortiori*, "the practical and the just" demand judicial remedies even more clearly in this case than in *Southern Pacific*.

Minnesota Railroad and Warehouse Commission or the Minnesota Supreme Court orders to restore the commuter passenger train assignments to service. Our jurisdiction is confined and limited to the rules and agreements between the parties signatory thereto" (*id.* at 10).

Similarly, in *Order of Railway Conductors-Pittsburgh and Lake Erie Railroad Company*, 124 NRAB 251, 259 (1st Div. 1956), the holding was, "It is contended that a full crew should be used to turn engines in the Himrod Wye under the requirements of an Ohio State statute. If such an allegation were true, it is not a matter for determination by this Board." The principle is of long standing. In *American Train Dispatchers Association-The Chesapeake and Ohio Railway Company*, 1 NRAB 49, 53 (3rd Div. 1935), the NRAB held it lacked jurisdiction over "disputes which, under the cloak of a grievance, are in truth and fact working-condition problems which are not governed by rules or contracts * * *." See, generally, Spencer, *The National Adjustment Board* (U. of Chi. Press 1938). Accordingly, the NRAB has no jurisdiction over disputes arising out of or related to the work rules determined in *Akron*.

Inasmuch as the NRAB has no jurisdiction, the District Court's invocation of *forum non conveniens* (JA 32, 258 F. Supp. 346, 351) is plainly inapposite. Evidently, the District Court invoked that concept on the assumption that the NRAB had jurisdiction (*ibid.*). But it has none. Moreover, *forum non conveniens* can scarcely be invoked on behalf of the carriers subsequent to judicial adjudication of basic issues, in consolidated cases, one of which the carriers initiated in the District of Columbia while they caused the transfer of the other to the same forum. This forum was selected and utilized by the carriers as convenient and appropriate. The litigation of the after-Award rights and obligations of the parties has proceeded for years in this forum. In any event, *forum non conveniens*

is a touchstone for transfer between district courts both of which can have jurisdiction, 28 U.S.C. § 1404(a); 1 *Moore's Federal Practice* ¶0. 145. Certainly *forum non conveniens* cannot confer or create jurisdiction where otherwise there is none. As demonstrated above, the NRAB has no jurisdiction. The District Court declaration to the contrary is invalid and should not be sustained.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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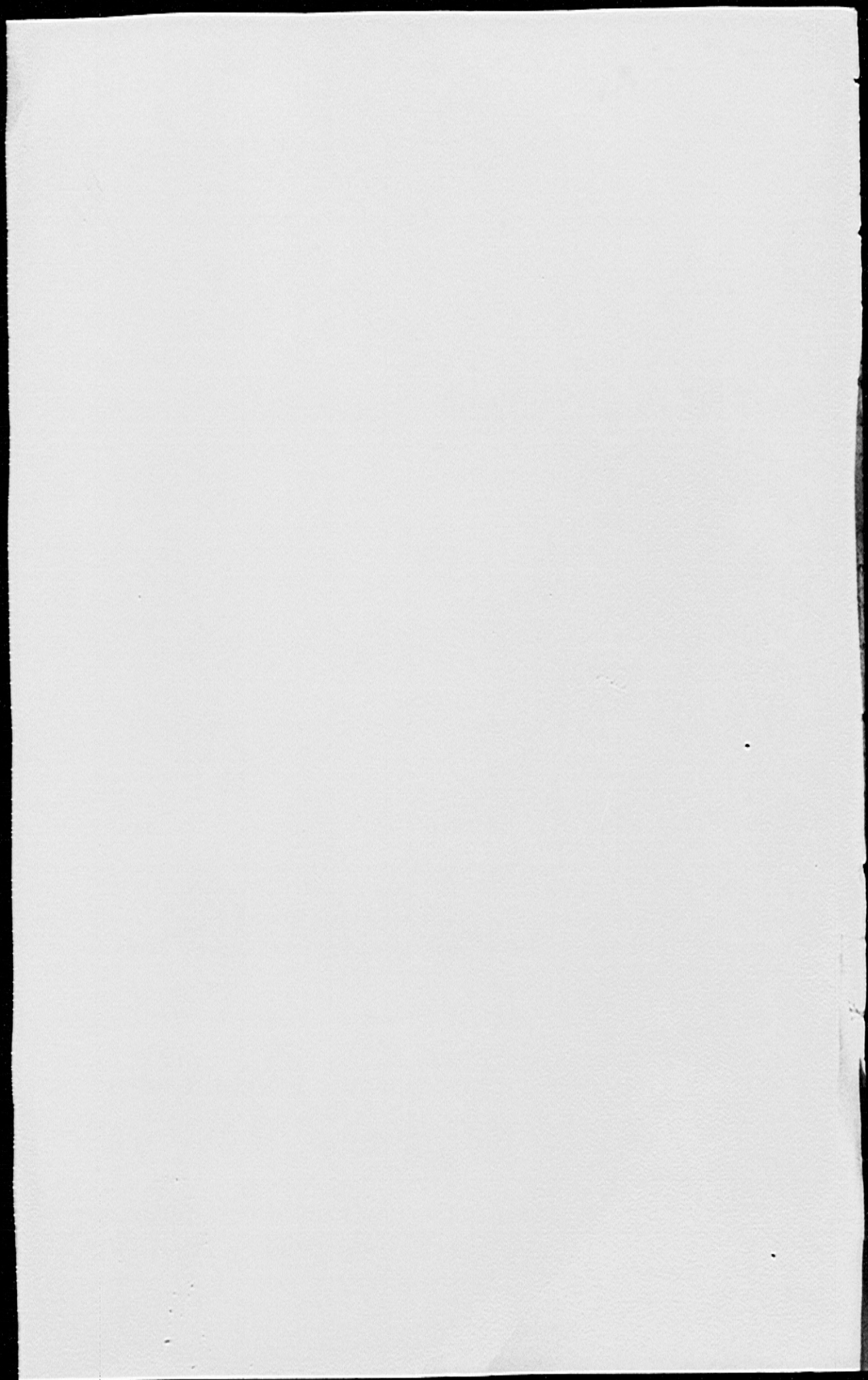
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,909

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, *Appellant*,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY,
ET AL., *Appellees*.

No. 20,910

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, *Appellant*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, ET AL., *Appellees*.*

ON APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE GALVESTON WHARVES

This proceeding is an aspect of the litigation generally concerning the effect of the expiration, on March 31, 1966,

* To facilitate convenient identification, we utilized the caption that appears on the Brief of Appellant, in which all of the railroad parties to the original proceedings below are named as Appellees. The order appealed from involves only one of those railroads, however, so that only that railroad—Galveston Wharves—properly is named as an Appellee.

of those provisions of the Award by Arbitration Board No. 282 relating to the use of firemen. The District Court entered its judgment (JA 51-57) in that litigation on May 12, 1966, pursuant to an opinion reported as *Bangor and Aroostook R. Co. v. Brotherhood of Loc. F. & E.*, 253 F. Supp. 682 (D. D.C., 1966). That judgment was affirmed in part and reversed in part by this Court, in opinions reported *sub nom.* as *Brotherhood of Railroad Trainmen v. Akron & B.B. R. Co.*, — U.S. App. D.C. —, 385 F.2d 581 (1967), cert. den., 390 U.S. 923 (1968). In accordance with the form followed in the Brief for Appellant, that decision hereinafter will be referred to as the "*Akron*" decision.

While the appeals from the May 12, 1966 judgment were pending in this Court, Appellant (hereinafter referred to as the "BLF&E" or the "Brotherhood") filed in the District Court an application for supplemental relief at the foot of that judgment requesting an injunction against alleged violations of the judgment by Galveston Wharves (JA 4-5, 21). Although all the carrier parties to the main litigation are named as Appellees in the instant appeals, in fact only Galveston Wharves is directly concerned. The application for supplemental relief was decided and these appeals were filed prior to the *Akron* decision by this Court.

Questions Presented

1. Did the provision in the Award by Arbitration Board No. 282 that firemen need not be used on certain crews, "provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition," establish a work rule which continues to apply until changed in accordance with the Railway Labor Act?

(a) Whether the aforesaid question was decided adversely to Appellant in the May 12, 1966 judgment and in

the *Akron* decision on appeal therefrom, and, if so, whether the question can be relitigated by Appellant on this appeal?

(b) Whether issues as to the validity of the provisions of Award 282, authorizing the carriers to list crews on locomotives not then equipped with deadman controls in good operating condition, are barred by *res judicata* and by Section 9 of the Railway Labor Act, and, if not, whether such provisions are invalid?

2. Since the provision in the order denying Appellant's application for supplemental relief, that such denial is without prejudice to any rights Appellant may have in a proceeding under Section 3 of the Railway Labor Act, was favorable to Appellant and was not objected to by Appellant, is that provision reviewable on this appeal and, if so, is it erroneous?

As required by General Rule 8(c) of this Court, we note that this case previously was before the Court, under the same or similar titles docketed as Nos. 20,192, 20,193, 20,215 and 20,216, and was then decided in the *Akron* decision referred to above.

Statement of the Case

Galveston Wharves is an agency of the City of Galveston, Texas. It operates the docks owned by and located in that City. In that connection, Galveston Wharves performs switching and other terminal services for the various railroads which serve the Galveston docks, and hence is a "carrier" as defined in Section 1 First of the Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 First). JA 12.

1. *The work rules established by Award 282.* In 1959, the overmanning of trains resulting from obsolete work rules having little or no relation to actual manpower needs in

the light of modern technological developments constituted a serious problem. The railroads generally were required, for example, to have a fireman on almost all locomotives even though steam powered locomotives had been replaced by diesels and the primary function of firemen—the shoveling of coal—had disappeared. In an effort to solve this problem, Galveston Wharves and most other railroads served the unions representing their operating employees (including the BLF&E) with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) proposing, among other things, to give management discretion to determine if and when firemen should be used in freight and yard service.

The dispute concerning those notices (and counterproposals served by the unions) was submitted to an *ad hoc* Presidential Railroad Commission for its recommendations. The Commission found that situations in which the use of a fireman was necessary for safe and efficient operation of locomotives in freight or yard service were “rare” and “unique.” Report of the Presidential Railroad Commission, February 28, 1962, at 45-46. Accordingly, the Commission recommended that agreements and rules requiring the use of firemen be abrogated and that, subject to measures for the protection of men already employed, the carriers should be permitted in their discretion to discontinue fireman assignments. *Id.*, at 48-50. Emergency Board No. 154, appointed pursuant to Section 10 of the Railway Labor Act (45 U.S.C. § 160), subsequently made similar recommendations.

Those recommendations were rejected by the unions, although accepted by the railroads, and the procedures of the Railway Labor Act were exhausted without settlement of the dispute, so that a nation-wide railroad strike impended. The Congress then enacted Public Law 88-108 (77

Stat. 132), whereby the fireman issue and another issue concerning the manning of train crews were submitted to arbitration for "complete and final disposition" (P.L. 88-108, § 3). Arbitration Board No. 282 was established to conduct the arbitration. After an independent review of the evidence, Board 282 agreed with the Presidential Railroad Commission "that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels." *Opinion of Neutral Members*, 41 Labor Arbitration 680, 688 (1963). From its "study of the record," the Board was "convinced . . . that the number of freight and yard assignments in which considerations of safety and efficiency dictate the need for firemen is relatively small" and that to permit "the firemen's organizations sole discretion to decide that firemen must be used in up to ten per cent of all crew assignments . . . provided a sufficient margin for error." *Id.*, at 691.

Section II of the Award by Arbitration Board No. 282 (JA 35-42) concerns the use of firemen. Part A of Section II provided that:

"All agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award."

The "terms of this Award" which "modified" the prior agreements, rules, etc. "with respect to the employment of firemen" are as follows:

Paragraphs B(1) through B(4) established a procedure whereby each carrier could list the pool and regularly assigned freight and yard engine crews, within each seniority district, which "in the carrier's judgment . . . do not re-

quire the services of a fireman," and the union's local chairman could designate or veto 10% of the crews thus listed. Paragraph B(5) provided that:

"After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service . . . or in any class of yard service . . . , other than in crews designated by the local chairman, pursuant to paragraph B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition."

Thus, the "terms" of Paragraph B(5) expressly "modified" the prior agreements and rules and established new work rules whereby firemen were not required to be used in freight and yard service except on the 10% of the pool and regularly assigned crews designated or vetoed by the union, within each seniority district, unless (1) the use of a fireman was necessary to provide employment to firemen entitled thereto by Parts C and D of Section II, or (2) a yard locomotive was being operated "without a deadman control in good operating condition."

Although the Award thus authorized the carriers eventually to eliminate approximately 90% of the firemen positions required by the prior agreements and rules, generous protections were provided for the individuals actually employed as firemen. The extent of those protections basically depended upon the individual's attachment to his job, as measured by his length of service (seniority) within a

particular seniority district and the frequency with which he worked as a fireman. Paragraph C(2) applied to firemen "hired on or after a date 2 years prior to the effective date of this Award," and authorized the carriers, in their discretion, to terminate all "employment and seniority rights" of such firemen upon payment of a liberal separation allowance. Paragraph C(3) established a similar rule with respect to firemen hired more than two years prior to the effective date of the Award who had worked so infrequently that they had not earned more than \$200 per month during the two-year period prior to the effective date of the Award. Paragraph C(6) applied to all "other firemen . . . with less than 10 years' seniority on the effective date of the Award. . . ." The carriers were authorized, in their discretion, to offer such fireman a "comparable job" (including a five-year guarantee against any reduction of pay and various fringe benefits) and, if that offer was refused, to sever the particular fireman from his "employment and seniority rights" upon payment of a generous separation allowance. Unless and until thus given a comparable job or discharged, those firemen were entitled, by paragraph D(2), to continue in engine service employment (unless removed from employment by natural attrition) if available in their respective seniority districts. Paragraph C(7) applied to firemen "with 10 years or more of seniority as of the effective date of this Award," and (together with paragraph D(2)) entitled such firemen to continued employment in engine service until removed from employment by natural attrition.

Firemen coming within the coverage of a particular paragraph of Part C of Section II commonly are referred to by the number of that paragraph. For example, firemen "hired on or after a date 2 years prior to the effective date of the Award," with which we are here particularly con-

In short, as stated by Board 282 in its Answer, on October 23, 1964, to BLF&E Question No. 34 (JA 43), the Award did not limit the right of the carriers "to furlough employees hired after the effective date of the Award" (although that right may be "controlled by the local collective bargaining agreements"), but if "such employees are 'separated from the carrier's payrolls and have all their employment and seniority rights and relations terminated' pursuant to . . . Paragraph C(2) of the Award, they are entitled to the separation allowance provided by that Paragraph." Board 282 and its Award thus made a clear distinction between furloughing C(2) firemen hired after the effective date of the Award and the termination of all employment and seniority rights of such firemen pursuant to Paragraph C(2).

2. *The actions complained of.* Galveston Wharves operates a single terminal or yard, all of which is comprised within one seniority district, and had only five regularly assigned yard crews as of January 3, 1967. All of those crews had been listed during the period of the Award pursuant to Paragraphs B(1) or B(3) as being crews on which, in the carrier's judgment, firemen were not needed, and one of them had been designated or vetoed by the BLF&E.² JA 13. Thus, under the work rules established by the Award, Galveston Wharves was required to use a fireman only on the one vetoed crew, except insofar as necessary to provide engine service assignments to C(6) and C(7) firemen and when its yard engines were being operated without deadman controls in good operating condition. See pp. 5-6, *supra*.

² Board 282 interpreted the provision in its Award authorizing 10% of the listed crews to be vetoed as entitling the union to veto one crew if the number listed in a seniority district was five or more and less than 14, to veto two crews if the number listed was 14 or more and less than 25, etc. Answer, on May 17, 1964, to Carriers' Question No. 4 under Section II—Part B(1) and B(2). The BLF&E concedes in its brief (*e.g.*, p. 4) that Galveston Wharves listed its crews during the period of the Award.

Galveston Wharves did not have deadman controls on its yard locomotives when the Award became effective. Although such controls were ordered early in 1965, they were not delivered until April of 1966 and they did not work properly when installed at that time. It eventually was determined that certain valves were defective, and those valves were replaced in December of 1966. Throughout this period, Galveston Wharves continued to use firemen on all its yard engines, including those operated by crews that had been listed but not vetoed, pursuant to the rule established by Paragraph B(5) of the Award "that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition." JA 13-14.

After replacing the defective valves and ascertaining that the deadman controls finally were in "good operating condition," Galveston Wharves issued a bulletin (on January 3, 1967) abolishing (or "blanking" to use the terminology that has become common in connection with application of Award 282) the fireman's assignment on the four yard crews which the carrier had listed pursuant to the Award and which had not been vetoed by the BLF&E. The carrier did not terminate all of the employment and seniority rights of any fireman as a result of this action (or at any other time insofar as the application of Award 282 is concerned). The C(6) and C(7) firemen continued to be used in engine service, as required by the rules established by the Award, on the vetoed assignment, on the extra board,³ or as locomotive engineers. JA 14-17.

³ Persons assigned to an extra board or extra list fill temporary vacancies (such as those caused by sickness) in regular assignments. Galveston Wharves guaranteed the firemen on its extra board compensation equivalent to that received by firemen holding regular assignments. JA 15-17. The right of a carrier to use C(6) and C(7) firemen on an extra board, for purposes of providing the engine service required by the Award, is established by Paragraphs D(3) and D(4) of Section II (JA

Three C(2) firemen were furloughed (after the court below upheld the carrier's right to do so). Each of those firemen was hired after the effective date of Award 282 (and prior to its expiration), and thus each knew or should have known of the limitations imposed by the Award upon his employment rights. Neither those employment rights nor the seniority rights of the furloughed firemen were terminated, and they remained in the carrier's employ subject to recall to active duty whenever sufficient C(6) and C(7) firemen are not available to fill the "must fill" assignments on which a fireman must be used. This action was taken in accordance with the carrier's rules as modified by the Award. JA 17-18, 20. We are informed by Galveston Wharves that the three firemen have in fact been recalled on numerous occasions, and that each earned over \$3,000 from the carrier in the first seven months of 1968. When on furlough, moreover, they are free to engage in outside employment.

3. *The decision below.* As we noted at the outset, this controversy arose pursuant to an application by the BLF&E for supplemental relief at the foot of the May 12, 1966 judgment in the main litigation arising out of the expiration of the firemen's provisions of Award 282 on March 31, 1966. The only issue argued before the District Court was whether Galveston Wharves had a right, under that judgment, to furlough the three C(2) firemen hired after the effective date of the Award. That judgment provided, among other things, that (JA 52-53):

"4. After the expiration of the Award, the railroads cannot terminate the employment of firemen (helpers) pursuant to the provisions of Paragraphs C(2), C(3),

41-42), and has been confirmed in numerous rulings by Board 282. *E.g.*, Answers to BLF&E Questions No. 28 (JA 43), 60(b) (JA 43-44), 74(a) (JA 44), and to Southern Pacific Question 1(e) and BLF&E Question 2 (JA 49-50).

C(4) or C(6) of Section II of the Award and cannot offer comparable jobs to firemen (helpers) pursuant to the provisions of Paragraph C(6) of Section II of the Award.

"5. The rules governing the use of firemen (helpers) in effect prior to the enactment of Public Law 88-108 were not restored upon the expiration of the Award. Subject to the provisions of paragraph 4 above, the modifications in those rules made by Section II of the Award and actions taken thereunder created a new status which is to be maintained after expiration of the Award until changed by agreement or until the procedures of the Railway Labor Act . . . have been exhausted with respect to valid notices served under Section 6 of that Act . . . proposing changes in the status thus created. Unless otherwise agreed to by the parties, the railroads need not use firemen (helpers) on engines (other than steam powered) in freight and yard service except as required by the Award, including those provisions of the Award governing the rights of individual firemen (helpers) retained in engine service. Such individual firemen (helpers) shall continue to enjoy the protections of their rights to work which are provided in the Award, but the railroads need not hire a replacement for an individual fireman (helper) who retires, is discharged for cause or is otherwise removed from a railroad's active working list of firemen (helpers) by natural attrition, unless a replacement is needed to fill a position which was not subject to being abolished under the Award."

The BLF&E contended that the furloughing of the three C(2) firemen was equivalent to terminating "all of their employment and seniority rights and relations" pursuant to Paragraph C(2) of the Award, and hence was prohibited

by paragraph 4 of the May 12, 1966 judgment. Galveston Wharves pointed out that various rulings by Board 282 (summarized at pp. 8-10, *supra*) established beyond *bona fide* dispute that the furloughing of C(2) firemen hired after the effective date of the Award was distinct from the termination of the employment and seniority rights of such firemen under Paragraph C(2), that the only employment rights of such firemen when retained as employees were to be used in "must fill" jobs (in accordance with their seniority) when no C(6) or C(7) firemen were available to fill vacancies in such jobs, and that the rules established by the Award did not otherwise limit the right of the carriers to furlough such firemen. Hence, Galveston Wharves contended that its action in furloughing the three firemen was authorized by paragraph 5 of the May 12, 1966 judgment rather than being prohibited by paragraph 4 of that judgment.

Judge Holtzoff, who had rendered the May 12, 1966 judgment, agreed with the carrier's interpretation of that judgment,⁴ and entered an order on February 10, 1967 (JA 34) providing that:

"1. The furloughing of the firemen involved in the application, who were hired after the effective date of the Award by Arbitration Board 282, does not violate the Judgment of May 12, 1966 under the circumstances disclosed by the affidavits on file.

"2. The Motion for Preliminary Injunction is denied, without prejudice to any administrative proceeding."

⁴ Judge Holtzoff initially had reached a contrary conclusion (JA 24-25), but "what started me along the line of thought that led to [that] conclusion was the impression that I gathered—and it was my fault that I gathered it—that the three men involved in the Galveston Wharves motion had been hired prior to the effective date of the Award, whereas it now appears that they were hired subsequently" (JA 27).

The provision in paragraph 2 of the order, whereby the denial of the Brotherhood's motion was "without prejudice to any administrative proceeding," was added *sua sponte* by Judge Holtzoff to the proposed order submitted to him (JA 32), without objection then or at any time by either party. This obviously was done pursuant to the conclusion, expressed by Judge Holtzoff in his oral opinion (JA 29-32), in which he stated (after quoting BLF&E Questions No. 34 and 133 and the Answers thereto) that:

"In other words, it is the view of the Board that its Award should not be construed as limiting the rights of the carrier to furlough C-2 firemen, that is, firemen hired after the effective date of the Award or within the preceding two years, except insofar as those rights may be controlled by the local collective bargaining agreements.

"The construction of the Award [by Board 282] is binding on this Court and the Court is constrained to deny the motion for supplemental relief. This denial is, however, without prejudice to any administrative proceeding that may be brought before the National Railroad Adjustment Board or before a local board created to handle such matters."

It seems sufficiently plain when considered in context, therefore, that Judge Holtzoff merely preserved any rights that the BLF&E and the furloughed employees may have, in a proceeding under Section 3 of the Railway Labor Act (45 U.S.C. § 153), to contend that Galveston Wharves in furloughing those employees violated some provision of its collective bargaining agreement with the BLF&E which had not been modified by the Award and which, therefore, was not affected by the May 12, 1966 judgment and was not involved in the proceeding before the Court.

Following the remand by this Court pursuant to its *Akron* decision on the appeals from the May 12, 1966 judgment, the District Court (on May 29, 1968) entered a new judgment providing that "the Judgment entered by this Court on May 12, 1966, as modified by the opinions and judgment of the United States Court of Appeals for the District of Columbia Circuit, is hereby reaffirmed and re-entered."

Statutes Involved

The relevant statutory provisions are set forth in the Appendix hereto.

Summary of Argument

The May 12, 1966 judgment by the District Court, except to the extent that it was reversed by this Court in its *Akron* decision on appeal therefrom, has become final and cannot be relitigated in this appeal. The only issues on the merits which properly can be raised in this appeal from an order construing that judgment pursuant to the application by the BLF&E at the foot of the judgment is whether the District Court correctly construed its judgment and whether the subsequent *Akron* decision by this Court required a different result.

The BLF&E does not seriously contend that the court below misconstrued its May 12, 1966 judgment. All that Galveston Wharves did was to discontinue the use of firemen on certain yard crews, pursuant to work rules established by Award 282 whereby firemen did not have to be used on such crews when operating locomotives equipped with deadman controls in good operating condition. All the existing firemen employed by Galveston Wharves, including the C(2) firemen furloughed by that carrier, continued to receive the employment rights to which they were entitled under that Award as interpreted by Board 282.

Hence, this action accorded with paragraph 5 of the May 12, 1966 judgment, which provided that the modifications in the prior rules pursuant to Award 282 created a new status which continues to apply until changed in accordance with the Railway Labor Act, so that the carriers after expiration of the Award need not use firemen in diesel freight and yard service "except as required by the Award, including those provisions of the Award governing the rights of individual firemen (helpers) retained in engine service."

In its *Akron* decision, this Court expressly affirmed the pertinent provisions of the May 12, 1966 judgment, and certainly did not reverse those provisions insofar as material here. This Court affirmed the principle that the work rules established pursuant to Award 282 continue to apply until changed in accordance with the Railway Labor Act. And, more specifically, this Court held that the carriers could apply those work rules after expiration of the Award so as to abolish fireman assignments, which were listed but not vetoed during the period of the Award, even if firemen were being used in such assignments when the Award expired. Those holdings are decisive here.

The carriers were permitted by the Award to list crews as being among those which, in their judgment, did not need a fireman even though the crews were being used at the time on yard engines not equipped with deadman controls in good operating condition. Galveston Wharves did so list the crews involved here. The validity of the Award was upheld in a 1964 decision, and that decision is *res judicata* with respect to the contention by the BLF&E that those listings (and hence the Award) were invalid. That contention also is barred by Section 9 Second of the Railway Labor Act. Moreover, the aspect of the *Akron* decision relied upon by the BLF&E to support that contention is irrelevant. The Court was there concerned with situations

in which the use of a fireman was required throughout the period of Award 282 by a valid state "full crew" law. Texas did not and does not have such a law applicable to diesel locomotives.

While the BLF&E did not and does not suggest that the furloughing of the C(2) firemen violated some provision in the collective bargaining agreements between Galveston Wharves and the BLF&E which had not been modified by Award 282, Judge Holtzoff did not want to foreclose the BLF&E from possibly raising such a contention in a proceeding under Section 3 of the Railway Labor Act. Hence, he provided that his denial of the Brotherhood's application was without prejudice to such an administrative proceeding. This action obviously was favorable to the BLF&E and was not objected to by the BLF&E, so that it cannot properly be questioned on this appeal. In any event, it is well established that claims based upon alleged violations of collective bargaining agreements are within the exclusive jurisdiction of the National Railroad Adjustment Board or local adjustment boards created under Section 3.

Argument

In a proceeding to construe or enforce a judgment, the validity of the judgment cannot be relitigated, and the only issue ordinarily open upon an appeal from an order in that regard is whether the order properly construed or enforced the prior judgment.⁵ To the extent that the May

⁵ *E.g.*, *Barnards v. Johnson*, 314 U.S. 19, 29, 32 (1941); *Lewisburg Bank v. Sheffey*, 140 U.S. 445, 452 (1891); *Barbachano v. Allen*, 192 F.2d 836, 840 (9th Cir., 1951); *City of Wheeling v. John F. Casey Co.*, 89 F.2d 308, 310 (4th Cir., 1937); *Sanders v. Bluefield Waterworks & Improvement Co.*, 106 Fed. 587, 591 (4th Cir., 1901). Similarly, on appeal from a judgment entered after remand from a prior appeal, the appellate court will consider only whether the judgment complies with its mandate and will not permit the appellant to raise (or re-raise) issues which were or could have been raised on the prior appeal. *E.g.*, *Aspen Mining &*

12, 1966 judgment of the District Court has been modified by this Court in its *Akron* decision on appeal from that judgment, we believe that the BLF&E is entitled to argue on this appeal that such modifications require a reversal or modification of the February 12, 1967 order denying its application for relief at the foot of the May 12, 1966 judgment.⁶ But unless the BLF&E can show that this Court in *Akron* disapproved those aspects of the May 12, 1966 judgment which underlie the February 12, 1967 order now on appeal, that order should be affirmed in the absence of any showing that the District Court misconstrued its prior judgment.

The BLF&E does not seriously press its contention below that the action of Galveston Wharves in furloughing the three C(2) firemen, subject to recall when needed to fill a position in which the use of a firemen is required, violated the May 12, 1966 judgment (either as originally entered or as re-entered upon remand). That contention has been relegated to a footnote in the Brief of Appellant (pp. 14-16), and obviously is untenable. Judge Holtzoff certainly knows better than anyone else what he intended when he entered that judgment, and his interpretation of his judgment in the present proceeding fully accords with the language of the judgment.

While paragraph 4 of the May 12, 1966 judgment prohibited the carriers from terminating the employment of firemen pursuant to Paragraph C(2) of the Award, Board 282 has authoritatively determined that furloughing a C(2) fireman is not the same thing as terminating all his employment and seniority rights and relations so as to come

Smelting Co. v. Billings, 150 U.S. 31, 37 (1893); *Paull v. Archer-Daniells-Midland Company*, 313 F.2d 612, 617-618 (8th Cir., 1963); *Smith v. Pollin*, 90 U.S. App. D.C. 286, 196 F.2d 768 (1952).

⁶ See, e.g., *In re Elmore*, — U.S. App. D.C. —, 382 F.2d 125, 127 (1967), and cases there cited.

within Paragraph C(2), and that neither Paragraph C(2) nor any other provision of the Award limits the right of the carriers to furlough such firemen.⁷ Furthermore, paragraph 5 of the May 12, 1966 judgment expressly provided that "the railroads need not use firemen (helpers) on engines (other than steam powered) in freight and yard service except as required by the Award, including those provisions of the Award governing the rights of individual firemen (helpers) retained in engine service." And, Board 282 also has authoritatively determined that the carriers are not required by the Award to use C(2) firemen retained in engine service except when no C(6) or C(7) firemen are available to fill positions in which a fireman must be used. See pp. 8-10, 12-13, *supra*.

Judge Holtzoff clearly was justified in relying upon the interpretations by Board 282 of its Award. As we have noted (p. 8, *supra*), the governing statutes give Board 282 jurisdiction to determine disputes as to the meaning

⁷ In any event, we understand this Court to have reversed the ruling by Judge Holtzoff expressed in paragraph 4 of the May 12, 1966 judgment. In the *Akron* decision on appeal from that judgment, this Court held that: "The work rules effectuating the changes made under the Award include the ancillary protective provisions of Part II.C for individuals transferred or separated in implementing the change. These work rules continued in effect after the Award." 385 F.2d, at 611, fn. 2. Thus, the Court expressly held—contrary to the ruling by Judge Holtzoff—that Part C of Section II (including Paragraph C(2) established work rules that continue to apply until changed in accordance with the Railway Labor Act. This holding accords with the fundamental premise of this Court's decision that the rules established by or pursuant to the Award continue to apply after expiration of the Award by virtue of Section 6 of the Railway Act, until changed in accordance with that Act, even though procedures for establishing such rules terminated with the Award. See pp. 23-27, *infra*. The provisions in Part C are in no way "procedural," but give the carriers a direct right to separate certain firemen from employment. And, the circumstances in which employees may be separated from employment and the rights of the employees in that regard undoubtedly may be the subject of "rules" within the meaning of that term as used in Section 6 of the Railway Labor Act. *Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330, 336 (1960); see 385 F.2d, at 601.

or application of its Award, and its rulings or interpretations in that regard become a part of the Award. This Court has held that Board 282 has primary jurisdiction of such disputes. See the cases cited in footnote 1 on page 8, *supra*. None of the rulings relied upon by Judge Holtzoff or by Galveston Wharves was the subject of an impeachment petition under Section 9 of the Railway Labor Act, and hence those rulings become "final and conclusive on the parties" ten days after they were filed by Board 282 with the District Court, as provided in Section 9 Second (45 U.S.C. § 159 Second). The BLF&E does not contend in its brief, and it did not contend below, that either Galveston Wharves or Judge Holtzoff misunderstood the Award as interpreted by Board 282.⁸ Consequently, as Judge Holtzoff pointed out, the "construction of the Award [by Board 282] is binding on this Court. . . ." See p. 14, *supra*.

Clearly, therefore, Judge Holtzoff was correct in ruling that the "furloughing of the firemen involved in the application, who were hired after the effective date of the Award by Arbitration Board 282, does not violate the Judgment of May 12, 1966 under the circumstances disclosed by the affidavits on file." As noted above, the BLF&E in its brief does not seriously contend to the contrary. Rather, the Brotherhood's primary contention is that Galveston Wharves could not discontinue or "blank" the fireman's assignment on four of its yard crews, even though

⁸ Of course, a *bona fide* dispute in that regard would come within the primary jurisdiction of Board 282. This Court has held that the jurisdiction of the Board over disputes as to the meaning or application of its Award continued to exist following expiration of the Award. *Brotherhood of Rail. Train. v. Terminal R. Ass'n of St. Louis*, *supra* at 590. See also, *New York, C. & St. L. R. Co. v. Brotherhood of Loc. Fire. & Eng.*, 358 F.2d 464 (6th Cir., 1966), in which the court held that an issue as to the interpretation of the Award should be submitted to Board 282, and remanded for that purpose (if the parties could not settle their differences) one day prior to expiration of the Award.

the crews were listed under the Award, were not vetoed, and had deadman controls in good operating condition, because the deadman controls were not installed and placed in good operating condition until after expiration of the Award.

The order appealed from, however, does not speak about the right of the carrier to abolish those assignments. That right comes directly from the holding, in paragraph 5 of the May 12, 1966 judgment, that the work rules established pursuant to the Award continue to apply until changed in accordance with the Railway Labor Act. The BLF&E did not contend below that Galveston Wharves could not, under those work rules and judgment, abolish a listed and unvetoed yard engine assignment on a locomotive equipped with deadmen controls in good operating condition, merely because such controls were not installed until after the Award expired. Its present contention to that effect purports to be based upon this Court's *Akron* decision, on appeal from the May 12, 1966 judgment, but in fact (as we shall show) constitutes an attempt to relitigate a contrary holding in that decision. In addition, the BLF&E contends that the District Court somehow erred in preserving any right that the Brotherhood may have to seek relief under Section 3 of the Railway Labor Act. We shall also show that that contention is not properly here and is without substance.

I

The Work Rule Established by Award 282, Whereby Firemen Need Not Be Used on Unvetoed Yard Crews When Operating a Locomotive Having a Deadman Control in Good Operating Condition, Continues to Apply After Expiration of the Award Until Changed in Accordance With the Railway Labor Act.

In its *Akron* decision, this Court affirmed the ruling by Judge Holtzoff (expressed in paragraph 5 of his May 12, 1966 judgment) that the work rules established under the Award continued to apply after expiration of the Award until changed in accordance with the Railway Labor Act. More specifically, for present purposes, the Court also held that where a crew was listed under the Award by a carrier and was not vetoed by the union, but for one reason or another a fireman had been used on that crew throughout the period of the Award, the carrier could discontinue the use of a fireman on the crew after expiration of the Award pursuant to the work rule established under the Award. This is the situation complained of here by the BLF&E. While the Court further held that an effective state "full crew" law "blocked" any change pursuant to the Award in the prior work rules insofar as they related to assignments on which the use of a fireman was required by such "full crew" laws, Galveston Wharves was not subject to any such law. Hence, that holding, upon which the BLF&E relies, is inapposite here.

The *Akron* decision disposed of litigation arising out of the crew consist provisions of Award 282 as well as the litigation arising out of the expiration of the firemen's provisions of that Award, and involved numerous issues which have no relevance here. The principal issue, however, and the one which gave rise to those aspects of the decision pertinent to this appeal, generally concerned the

rules in effect following the expiration of the Award. The BLF&E and the other unions contended that the rules in existence prior to the Award had been automatically restored to full force and effect,⁹ while the carriers contended those those rules as modified by or pursuant to the Award continued to apply until changed in accordance with the Railway Labor Act. On this issue, the Court agreed with the carriers and with the court below. Thus, the Court summarized its decision as "approv[ing] the conclusion of the District Court that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition and that the new plateau of work rules, established for early 1966 by the Award, continued in effect unless changed in accordance with the Railway Labor Act." 385 F.2d, at 587.

The Court explained its reasons for that holding as follows (385 F.2d, at 593):

"We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect

⁹ In its brief (p. 36), the BLF&E referred to the furloughing of the C(2) firemen by Galveston Wharves, which was then being proposed by the carrier, as an illustration of the "unreasonable" nature of the May 12, 1966 judgment.

on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. ‘The effect of §6 is to prolong agreements subject to its provisions regardless of what they say as to termination.’ It likewise applies even though the work rules are established by an arbitration award of limited duration.

“This by no means suggests that there is no legal significance in establishing an award or agreement as one of limited duration. The limited duration has the obvious significance that work rules can be changed for the post-expiration period. The work rules can be changed, however, only by compliance with the provisions of the Railway Labor Act prescribing how changes in work rules are to be effectuated.”

This Court’s initial opinion, issued on May 12, 1967, concluded with directions that the parties submit a proposed judgment within 10 days, at which “time the parties may also request supplemental rulings on any matters that have not been discussed in this opinion.” 385 F.2d, at 605.¹⁰ This led to a supplemental opinion, issued on July

¹⁰ In its Memorandum Concerning Judgment Proposed by the Brotherhood of Locomotive Firemen and Enginemen, at p. 7, the BLF&E referred to the order now on appeal, and contended (pp. 1-7) that this Court should repudiate the May 12, 1966 judgment as thus construed and hold, among other things, that firemen must continue to be used in any assignments on which they were being used when the Award expired.

31, 1967, and amended on September 21, 1967. In that supplemental opinion, the Court reaffirmed its earlier conclusion that "the work rules resulting from the Award . . . endure, by virtue of the Railway Labor Act; they are deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute." 385 F.2d, at 609.

The Court went on to hold (contrary in that regard to the carriers' contentions) that the provisions for the listing and vetoing of pool and regularly assigned crews, in Paragraphs B(1) through B(4) of Section II of the Award, did not constitute work rules, but "procedures for establishing new work rules," which "procedures . . . had no effectiveness after the expiration of the Award." When crews were listed and were not vetoed in the exercise of those "procedures," however, there were "effected what must be regarded as new 'rules' applicable to the particular runs involved." 385 F.2d, at 609-610. The Court further held (contrary in this regard to the Brotherhood's contentions) that (385 F.2d, at 611):

"... if the work rule in effect on the last day of the Award provided that a fireman was not required for a particular engine crew—because that crew was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award. The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an

action in accordance with the work rules in force on the critical date, a rule which provided that no fireman was required for that crew."

The last-quoted ruling is squarely applicable here. Galveston Wharves included all five of its regularly-assigned yard crews "on the carrier's list of proposed blankable jobs" and, as to four of those crews, "the union's local chairman did not designate it for the retention of a fireman. . . ." Hence, "the work rule in effect on the last day of the Award provided that a fireman was not required for" the four crews that had been listed and not vetoed. To be sure, that work rule was (and is) subject to the requirements, established by Paragraph B(5) of the Award, that such positions be made available to C(6) and C(7) firemen if and when necessary to provide them with engine-service assignments and that firemen be used whenever the yard engines are operated without a deadman control in good operating condition. But the fact that a fireman was being used on a particular crew in order to meet one or the other of those requirements when the Award expires does not mean that a fireman must continue to be used thereafter even though the use of a fireman is no longer necessary for that purpose. Rather, as this Court held, the carrier may then remove the fireman from the crew and refuse to replace him because: "Such action would not constitute a change in work rules but simply an action in accordance with the work rules in force on the critical date, a rule which provided that no fireman was required for that crew."

Even apart from this specific holding by the Court in its *Akron* decision, we are plainly concerned here with the application of a "work rule" established by the Award, which work rule, under the basic principles declared by the

Court in *Akron*, continues to apply until changed in accordance with the Railway Labor Act.

The significance of whether or not a yard locomotive is equipped with a deadman control in good operating condition, insofar as any requirement for the use of a fireman is concerned, stems entirely from Award 282. Neither the National Diesel Agreement nor any other agreement or rule in effect prior to Award 282, of which we are aware (and certainly insofar as Galveston Wharves is concerned), made the use of a fireman dependent in any way upon deadman controls. Rather, the rule requiring the use of a fireman on a "yard locomotive . . . unless and until it is equipped with a deadman control in good operating condition" was recommended by the Presidential Railroad Commission (see p. 37, *infra*), was adopted by Board 282, and became effective "37 days following the effective date of this Award" as provided in Paragraph B(5) thereof. Thus, as the Neutral Members stated (in a remark which the BLF&E has noted in its brief (p. 13), it is "our award"—not the National Diesel Agreement—which "requires" the installation of deadman controls on yard locomotives "as a condition precedent to the operation of such locomotives without a fireman." *Opinion of Neutral Members*, 41 Labor Arbitration 680, 687-688 (1963).

Plainly, the requirement of a deadman control in good operating condition is not a procedure for establishing new work rules, such as this Court held terminated with the Award, but is a garden variety type of work rule specifying that a fireman must be used in certain circumstances (the absence of a deadman control in good operating condition) and need not be used in certain other circumstances (the presence of a deadman control in good operating condition). The time when, or the frequency with which, one set of circumstances or the other comes about is immaterial. We believe this is plain from the language of the Award,

and it is made even plainer, if possible, by the Answer of Board 282, on June 9, 1964, to BLF&E Question No. 10. That Question read as follows:

"Is the employment of a helper-fireman required on a yard assignment if the deadman control on a single manned yard locomotive becomes inoperative after a shift has commenced?"

Board 282 replied that:

"If the deadman control on a single manned yard locomotive becomes inoperative after a shift has commenced, this locomotive should not be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition."

In short, even if an unvetoes yard crew has not included a fireman for months or years because the yard locomotive has been equipped throughout that period with a deadman control in good operating condition and this situation exists when a particular shift commences, if the deadman control breaks down so as no longer to be in good operating condition, a fireman has to be added to the crew unless and until the deadman control is restored to good operating condition, but when that occurs a fireman need not be used any longer. It would be obvious nonsense to suggest that a "procedure" is gone through in such circumstances, first establishing a work rule requiring the use of a fireman and then establishing still another work rule dispensing with the use of a fireman. All that happens is that the deadman control breaks down and later is repaired or replaced. The same work rule applies throughout—the work rule established by Award 282 that firemen need not be used on unvetoes yard crews, provided that a fireman must be used whenever a yard locomotive is not equipped with a deadman control in good operating condition—although the conse-

quences of that work rule differ from time to time depending upon the condition of the deadman control.

The same work rule applies even though, as here, the unvetoes yard locomotives were not equipped with deadman controls in good operating condition when the rule became effective. The rule by its terms recognized and provided for that situation by requiring the use of a fireman "unless and until" the yard locomotive "is equipped" with a deadman control in good operating condition. The installation by Galveston Wharves of such deadman controls, in December of 1966, no more constituted the exercise of some "procedure" for establishing new work rules than would the repair of a deadman control after it had broken down. Rather, the installation of the deadman controls in good operating condition simply brought about a change in the circumstances to which the work rule established by the Award applied so as to bring about a condition in which the rule permitted Galveston Wharves to dispense with the use of firemen.

Galveston Wharves undoubtedly had the right under the Award to list its regularly established yard crews, even though its yard locomotives were not equipped with deadman controls in good operating condition. Paragraph B(1) authorized the carrier to list those pool and regularly established crews "which, *in the carrier's judgment*, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper)." (JA 36; emphasis added.) And, Board 282 ruled that:¹¹

¹¹ Answer, on October 23, 1964, to BLF&E Question No. 82, which read as follows:

"Is it the intent of the Award and its subsequent interpretations to allow a carrier to arbitrarily ignore the criteria of safety, efficiency and burden of work in creating 'blanked' assignments and instead applying the criteria of earnings and cost of employing a helper-fireman as the principal factor of determination."

"Section II, Part B, Paragraph B(1), contemplates that in determining which crews do not require the services of a fireman, *the carrier's judgment* of the factors of safety, undue work burden and adequate and safe transportation service to the public *shall be controlling*." (Emphasis added.)

Consequently, the Award gave the carriers the absolute right, in their unreviewable discretion, to determine which crews should be listed, just as it gave the union a similar right to determine which crews should be vetoed (Paragraph B(2); JA 36).

Nothing in the Award purported to exclude from this right those crews used on yard locomotives not equipped with deadman controls in good operating condition, and Board 282 clearly contemplated that such crews could be listed. The Neutral Members remarked, for example, that the Award would not permit the carriers "immediately to stop assigning firemen on ninety per cent of the . . . crews which they listed" because, *inter alia*, the carriers nevertheless are required to use firemen on yard locomotives "unless and until . . . equipped with a deadman control in good operating condition. . . ." *Opinion of Neutral Members, supra*, at 690. This understanding was shared by the parties. Galveston Wharves listed its regularly assigned yard crews without objection by the BLF&E, and the BLF&E exercised its right under the Award to veto one of those crews. We understand that the same practice of listing yard crews, even though then being used on locomotives not equipped with deadman controls in good operating condition, was followed by the other carriers and that the BLF&E exercised its veto rights with regard to such crews on the other carriers.

If there is any *bona fide* dispute about the interpretations of Award 282 which we have urged above, then the case should be remanded with instructions to submit that dispute to Board 282 for determination. This is required by the

statutory provisions conferring jurisdiction to determine disputes as to the meaning or application of the Award upon Board 282 (see p. 8, *supra*), and is what was done by this Court in the cases cited in fn. 1, p. 8, *supra*. We submit, however, that no *bona fide* dispute exists in this regard. See *Southern Ry. Co. v. Brotherhood of Locomotive Fire. & Eng.*, — U.S. App. D.C. —, 384 F.2d 323, 327-328 (1967). As we have shown, the language of Award 282, the prior interpretations by the Board and the consistent practice and understanding of the parties throughout the period of the Award fully support our view that the Award authorized the carriers, in their discretion, to list regularly established yard crews used on yard locomotives which at the time were not equipped with deadman controls in good operating condition, and that the Award established a new work rule whereby firemen need not be used on such crews (if not vetoed by the union) whenever the locomotives are equipped with deadman controls in good operating condition (unless necessary to provide engine service assignments to C(6) and C(7) firemen as required by the Award). And, the *Akron* decision holds that the work rule thus established continues to apply until changed in accordance with the Railway Labor Act.

Indeed, we do not understand the BLF&E in its brief to dispute our interpretation of the Award, and certainly it did not do so in the court below. The BLF&E does contend (Brief, at 11-15), however, "that the listing of a yard locomotive *not* equipped with a deadman control in good operating condition is an *invalid* listing" (Brief, at 13; emphasis in the original). This is tantamount to a contention that the Award itself was invalid insofar as it authorized the listing of crews used on yard locomotives not equipped at the time with deadman controls in good operating condition, and is barred by *res judicata* and by Section 9 of the Railway Labor Act. The contention is, moreover, completely lacking in substance.

As we have noted, Section 4 of P.L. 88-108 made Award 282 subject to Section 9 of the Railway Labor Act. Section 9 Second of that Act provides for the entry of a judgment upon an arbitration award, which shall be "final and conclusive," unless the validity of the award is attacked by a petition to impeach filed within 10 days after the award is filed with the district court. The BLF&E and certain other unions did file a petition to impeach the validity of Award 282, but the validity of the Award was upheld in *Brotherhood of Loc. Fire. & Eng. v. Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C., 1964), aff'd *per curiam*, 118 U.S. App. D.C. 100, 331 F.2d 1020 (1964). Subsequently, in considering petitions to impeach certain interpretations by Board 282 of its Award, this Court held that claims that the Award as so interpreted was invalid (because it did not comply with P.L. 88-108) were "precluded as being *res judicata* by virtue of the earlier review of the Award. . . ." *Brotherhood of Rail. Trainmen v. Chicago, M., St. P. & P. R. Co.*, — U.S. App. D.C. —, 380 F.2d 605, 608 (1967). The Court pointed out that the failure of the union to "urge this particular theory of illegality at the time of the [original] impeachment action is, of course, irrelevant," since a "party may not litigate one issue and then, upon an unsuccessful disposition, revivify the same cause of action with a new theory." *Id.*, at 608, fn. 5. Accord, *Brotherhood of Rail. Train. v. Chicago, M., St. P. & P. R. Co. (L.E.)*, — U.S. App. D.C. —, 383 F.2d 216 (1967); *Broth. of R. Trainmen v. St. Louis Southwestern Ry. Co.*, — U.S. App. D.C. —, 380 F.2d 603 (1967). And, of course, this follows also from the statutory requirement that objections to the validity of an award be raised within 10 days after the filing of the award with the district court.

We submit, therefore, that the Brotherhood's contention that the listing pursuant to the Award of crews used on yard locomotives not equipped with deadman controls in

good operating condition was invalid is barred and cannot be considered in this proceeding. But, in any event, that contention is without any substantial basis.

To support its contention that the listings by Galveston Wharves were invalid, and thus did not create a new work rule which applies until changed in accordance with the Railway Labor Act, the BLF&E relies entirely upon a purported analogy to a ruling by this Court in *Akron* concerning situations where the use of a fireman was required by an effective state "full crew" law. In that aspect of its *Akron* decision, the Court held that an effective (*i.e.*, valid) state "full crew" law "blocked" the establishment under Award 282 of new work rules contrary to the provisions of such law, unless and until the "full crew" law was repealed prior to expiration of the Award. Thus, the Court stated (385 F.2d, at 611-612) that:

"Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its life time was the fact that the change was blocked by a state's full crew law. The Supreme Court has expressly held that while such state law was in effect the Board had no capacity to make a change contrary to its provisions. See *Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R.*, 382 U.S. 423, 86 S. Ct. 594, 15. L.Ed.2d 501 (1966). . . .

"The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. The Court noted in *Rock Island*, *supra*, 382 U.S. at 433, 86 S. Ct. at 599:

Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this

dispute was not over the size of crews in States which had full-crew laws.

The Board authorized the carriers to list jobs for blanking, and thus provide a classification 'when and if such full crew laws are amended or repealed.' Answer of May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2). But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. . . ."

We thoroughly disagree with the above-quoted ruling by the Court and, to be candid, we do not understand how the Court could have reached the conclusions thus expressed. While the Supreme Court in the *Rock Island* case held that P.L. 88-108 and Award 282 did not preempt state "full crew" laws so that such laws, if otherwise valid or effective,¹² "blocked" any change pursuant to the Award of work rules which those laws established, we do not understand the Supreme Court to have considered (because the issue was not involved in that case), much less to have decided, whether or not changes pursuant to the Award in work rules established by the National Diesel Agreement

¹² The Supreme Court remanded the *Rock Island* case for consideration of other objections to the constitutionality of the "full crew" laws. 382 U.S., at 438. Upon remand, a three-judge district court held that the "full crew" law unconstitutionally burdened interstate commerce and violated due process because, since "the mid 1950's, if not before, the firemen on a diesel locomotive and the third brakeman or helper had, in general, ceased to perform significant safety functions in the operation and switching of freight trains and cars." *Chicago, Rock Island and Pacific Railroad Co. v. Hardin*, 274 F. Supp. 294, 303 (W.D. Ark., 1967), probable jurisdiction noted, 390 U.S. 941 (1968). While the issue is not involved in this appeal and thus will not be argued here, we note our understanding that, under this Court's *Akron* decision, only an effective or valid "full crew" law could "block" the establishment of new work rules, so that it will be plain that no such blockage occurred if the Supreme Court affirms the decision upon remand in *Rock Island*.

were "blocked." And, we understand Board 282 to have said, in its unimpeached Answer to Carriers' Question No. 5 under Section II—Part B(1) and B(2), that the Award did change the work rules established by the National Diesel Agreement in "full crew" law states as well as in all other states.¹³

But however that may be, the "full crew" holding in *Akron* plainly is inapplicable to the situation involved here. The operations of Galveston Wharves are confined entirely to an area within the City of Galveston, Texas, and Texas did not and does not have a "full crew" law applicable to diesel locomotives. See *State v. Southern Pacific Company*, Tex. Civ. App., 392 S.W. 2d 497, 499 (1965), and cases there cited. There is no suggestion by this Court in *Akron*, or by the Supreme Court in *Rock Island*, that the establishment of new work rules pursuant to the Award was "blocked" by the absence of a deadman control in good operating condition or by anything other than an effective "full crew" law. The *Rock Island* decision, upon which this Court relied, was grounded upon legislative history of P.L. 88-108 which demonstrated to the satisfaction of the

¹³ "The obligations and rights of the parties with respects to the listing of jobs and the exercise of the veto under Section II, Parts B(1), B(2), B(3) and B(4) of the Award are the same in the so-called 'full crew law states' as in all other states. Local chairmen who have failed to make designations pursuant to Part B(2) in 'full crew law states' may make such designations on or before June 3, 1964. Where the present designation by the local chairman designates all of the jobs listed as requiring the retention of firemen, he should modify such designations to conform to the 10 per cent limitation as interpreted by the Board in its answer to carrier's question No. 4 under Section II, Parts B(1) and B(2) on or before June 3, 1964."

The quotation by this Court in *Akron* (p. 28, *supra*) is not from the Board's Answer to Carriers' Question No. 5, but from the Question itself which stated, in part, that "It is the carriers' position that the carriers were required to submit lists under Part B(1) in order that there will be a classification of 'blankable' and 'non-blankable' jobs when and if such full crew laws are amended or repealed. . . ."

Supreme Court that the Congress had not intended that statute to preempt state "full crew" laws. 382 U.S., at 433-437. The BLF&E has not cited any legislative history of P.L. 88-108, and we know of none, which even purports to demonstrate that the Congress intended to preclude the Board from establishing work rules with respect to yard engines not equipped with deadman controls in good operating condition, and nothing in the statute itself purports to do so.

To the contrary, P.L. 88-108 required Board 282 "to give due consideration to those matters on which the parties were in tentative agreement" (§3). That was one aspect of the desire by Congress "to do as little as possible in solving the dispute which was before it," which desire was referred to by quotation in *Akron* from the Supreme Court's *Rock Island* opinion (see pp. 34-35, *supra*). The Neutral Members noted that "in respect to yard locomotives, the Presidential Railroad Commission recommended that no yard locomotive should be operated without a fireman unless and until it is equipped with a dead-man control in good operating condition, and the carriers have indicated from the outset their willingness to accept that recommendation."¹⁴ *Opinion of Neutral Members, supra* at 690. Hence, this was a matter on which there was tentative agreement and the possibility that Board 282 would adopt such a work rule embodying the recommendation of the Commission must have been contemplated by the Congress.

We submit, therefore, that the "full crew" holding in *Akron* does not support the Brotherhood's contention that

¹⁴ In its Report to the President (1962), at 48-50, the Commission recommended that the parties involved "replace the 1937 National Diesel Agreement, as revised by the National Diesel Agreement of May 17, 1950, with a new national agreement" providing among other things, that "12. No yard diesel may be operated without a fireman-helper unless it is equipped with a 'dead man's control' or other appropriate safety device."

the listing of crews used on yard locomotives not equipped with deadman controls in good operating condition was "invalid," and does not indicate in any way that Galveston Wharves erred in not using firemen on its listed and unvetoesd yard crews when engaged in operating yard locomotives equipped with deadman controls in good operating condition. Rather, as we have demonstrated, a separate holding in *Akron* and the fundamental premises of that decision establish that that action by Galveston Wharves was authorized by a work rule established pursuant to the Award which continues to apply until changed in accordance with the Railway Labor Act. Moreover, this Court in *Akron* "approve[d] its [the District Court's] approach [in its May 12, 1966 judgment] on matters drawn into question except as indicated in our opinions." 385 F.2d, at 615. The actions by Galveston Wharves complained of here undoubtedly were proper under the May 12, 1966 judgment. See pp. 19-22, *supra*. Hence, even if this Court in the *Akron* opinions could be said not to have specifically affirmed that portion of the judgment below which permitted such actions, the Court certainly did not specifically hold to the contrary and must have affirmed *sub silentio* either because such portion of the judgment was not "drawn into question" or because express discussion was considered unnecessary to the extent that it was "drawn into question." The BLF&E should not be permitted to relitigate that final decision on this appeal. See pp. 18-19, *supra*.

One final observation should be made on this aspect of the case. The BLF&E argues in essence that since Galveston Wharves used firemen on its yard locomotives as of the last day of the Award, because they were not then equipped with deadman controls in good operating condition, the *Akron* decision holds that firemen must continue to be used on such locomotives thereafter even when they are equipped with deadman controls in

good operating condition. If valid, this argument would mean, conversely, that if a fireman was not used on a yard locomotive as of the last day of the Award, because it was then equipped with a deadman control in good operating condition, a fireman would not have to be used on such locomotive thereafter even if the deadman control became inoperative or was removed.

Such a holding would ignore the whole purpose of deadman controls and could not have been intended by the Congress, by Board 282 or by this Court. As the Presidential Railroad Commission pointed out (Report, at 43-44), the reason for requiring the use of a fireman on yard locomotives not equipped with a deadman control in good operating condition is that sometimes the only other person in the cab of a yard locomotive (unlike a road locomotive) is the engineer. If the engineer should die or be disabled while the locomotive was in operation, a safety hazard might be created if there was neither a fireman nor a deadman control to stop the engine. But if equipped with a deadman control in good operating condition, that control will automatically stop the engine in such circumstances and a fireman is not needed for that purpose. Obviously, avoidance of such hazardous situations could not be assured by making the use of a fireman dependent upon whether a yard locomotive was equipped with a deadman control in good operating condition on some specific date, such as March 30, 1966, regardless of what happened after that date. The hazard could assuredly be avoided, and otherwise unneeded manpower dispensed with, by establishing a work rule whereby the use of a fireman on a yard locomotive at any particular future time depended upon whether or not the locomotive at that time was equipped with a deadman control in good operating condition. Accordingly, the Presidential Railroad Commission recommended and Board 282 established such a work rule. And,

under this Court's *Akron* decision, that work rule continues to apply until changed in accordance with the Railway Labor Act.

II

The BLF&E Cannot Complain of the Provision in the Order Preserving Any Right the BLF&E May Have in a Proceeding Under Section 3 of the Railway Labor Act.

The arguments by the BLF&E in Part II of its brief (pp. 15-21) appear to be directed primarily to an order which is now on appeal in Dockets No. 20,472, 20,473, and 20,647, rather than to the order on appeal in this proceeding. See p. 7 of the Brief for the BLF&E. Indeed, in its brief filed in those Dockets, the BLF&E stated (fn. 4, p. 17) that the asserted invalidity of the pertinent portion of the order on appeal in that proceeding would not be briefed "since we have fully briefed it in the pending companion appeal in Nos. 20,909 and 20,910."

The two sets of appeals have not been consolidated, and they were taken from separate orders entered at different times pursuant to separate proceedings on different applications by the BLF&E at the foot of the May 12, 1966 judgment. The validity of the order on appeal in Dockets No. 20,472, etc., cannot be reviewed in this appeal, since "jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment." *Reed v. Allen*, 286 U.S. 191, 198 (1932). Thus, we shall not discuss here the validity of that order, and shall leave that matter to the Brief for Appellees in Dockets No. 20,472, etc.

Insofar as the arguments in Part II of the Brotherhood's brief may be said to be directed to the order on appeal in this case, we believe that they do not raise any issue which properly may be considered by the Court. The BLF&E requested the District Court to construe its May 12, 1966

judgment as prohibiting Galveston Wharves from furloughing certain C(2) firemen and to enjoin Galveston Wharves from taking that action. The District Court did construe its judgment with respect to the matter in issue, in a manner adverse to the contentions of the BLF&E, and thus denied the request for injunctive relief. The material facts were not in dispute, and all the issues urged by the BLF&E were decided.

The District Court went on to provide that its denial of injunctive relief was "without prejudice to any administrative proceeding" because of the possibility that Galveston Wharves, in furloughing the three C(2) firemen, may have violated some provision in its agreements with the BLF&E that was not modified by Award 282. See pp. 14-15, *supra*. The BLF&E did not claim at the time and does not claim now that there was such a violation, so that the *sua sponte* action by the District Court in expressly preserving whatever rights the BLF&E and the affected employees may have in that regard probably was not necessary. But to the extent that this aspect of the order below has any significance, it obviously is favorable to the BLF&E.

It is not often that a party seeks to have reviewed a decision or portion of a decision which is favorable to himself, but it is clear that that cannot properly be done. The "general rule is to the effect that one may not appeal from a verdict generally in his favor, or from that portion of the decision which is favorable to himself," although "he may nevertheless secure a review of that portion of a decision which is adverse." *Galloway v. General Motors Acceptance Corporation*, 106 F.2d 466, 467 (4th Cir., 1939). See, e.g., *Boswell v. United States*, 123 F.2d 213, 215 (5th Cir., 1941); 4 C.J.S., Appeal and Error, § 183, p. 565; 36 C.J.S., Federal Courts, § 297(17), pp. 1125-

1126. Even if error had been committed, it would be harmless.

Moreover, the BLF&E did not object to this aspect of the order below, either at the time it was entered or in a motion to amend or reconsider or in any other manner. The general rule, of course, is that objections not made in the trial court are waived and will not be considered on appeal. Many of the decisions in this Circuit applying or expressing that rule are collected, and the rule applied, in *Miller v. Avirom*, — U.S. App. D.C. —, 384 F.2d 319 (1967). That rule also is applicable here. See *Lindbeck v. Wyatt Manufacturing Company*, 324 F.2d 807, 812 (10th Cir., 1963).

In any event, the arguments made by the BLF&E in its brief are completely beside the point. There is no problem here of a refusal by the District Court to construe its judgment or otherwise to determine the effect of the expiration of Award 282. The District Court considered and decided all of the issues pressed by the BLF&E, and the Brotherhood does not contend otherwise. Similarly, this aspect of the case does not involve any issue as to the enforcement of Award 282, such as was concerned in the *Southern Pacific* case cited by the BLF&E (Br., at 18),¹⁵ or any issue as to the meaning of P.L. 88-108.

¹⁵ This Court held, in *Akron*, that nothing in Award 282 survived its expiration date, and "the work rules resulting from the Award . . . endure" only because they are "deemed to be incorporated into the prior agreements of the parties. . . ." 385 F.2d, at 609. Hence, any individual claim or grievance based upon an alleged violation of "work rules resulting from the Award" would be a claim growing out of an alleged violation of a collective bargaining agreement, so as clearly to be within the exclusive jurisdiction of a Section 3 board. *Brotherhood of Loc. Fire. & Eng. v. Chicago & Illinois M. Ry. Co.*, 386 F.2d 229, 231 (7th Cir., 1967); see, also *Illinois Central R.R. Co. v. Railroad Trainmen*, 58 CCH Labor Cases ¶12,841 (7th Cir., 1968); *Southern Ry. Co. v. Brotherhood of Locomotive Fire. & Eng.*, *supra*. Moreover, the claims of the individual firemen should

As we have pointed out, all that the District Court did was to preserve whatever rights the BLF&E may have to contend, in proceedings under Section 3 of the Railway Labor Act, that Galveston Wharves violated some provision in the collective bargaining agreements between the parties which was not modified or otherwise affected by Award 282. Obviously, any such provisions were not involved in the litigation which culminated in this Court's *Akron* decision, were not affected by the May 12, 1966 judgment or the judgment upon remand, continued in effect unchanged through the period of Award 282, could not have been affected by the expiration of that Award, and have nothing to do with P.L. 88-108. Under any theory, therefore, a claim that such a contractual provision had been violated, if denied by the carrier, would constitute a dispute "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" within the meaning of Section 3 First (i) of the Railway Labor Act (45 U.S.C. § 153 First (i)).

It is well established that such disputes are within the exclusive jurisdiction of the National Railroad Adjustment Board (or of a local board established pursuant to Section 3 Second) and are not within the jurisdiction of the courts to decide. *E.g., Locomotive Engrs. v. L. & N. R. Co.*, 373 U.S. 33, 38 (1963); *Pennsylvania R. Co. v. Day*, 360 U.S. 548 (1959); *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950); *Southern Ry. Co. v. Brotherhood of Locomotive Fire. & Eng.*, *supra*. Moreover, even if such disputes

not be determined in a case to which they are not a party. *International Bro. of Team., Etc. v. Zantop Air Transport Corp.*, 394 F.2d 36, 41 (6th Cir., 1968). For these reasons, among others, the challenged provision in the order appealed from here would not be erroneous even if that provision had provided (as did the order appealed from in Nos. 20,472, etc.) that such individual claims and grievances "shall be referred either to the National Railroad Adjustment Board, or to an appropriate local board." See, also, the Brief of Appellees in Docket Nos. 20,472, etc., at pp. 46-47.

were within the jurisdiction of the courts to decide, they could not properly be raised in a motion at the foot of the judgment. This court pointed out, in *Brotherhood of Rail. Train. v. Atlantic Coast Line R. Co.*, — U.S. App. D.C. —, 383 F.2d 225, 228 (1967), that “there is a serious question about the propriety of introducing [an unrelated] issue in a motion for relief at the foot of the earlier decree, which was directed at very different questions,” and in our view that cannot properly be done.

Conclusion

For the reasons stated above, the order appealed from should be affirmed.

Respectfully submitted,

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APPENDIX

Public Law 88-108, 77 Stat. 132:

SEC. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters in which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

SEC. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall

report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §151 et seq.:

SEC. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

SEC. 7 Third * * *

(c) Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcom-

mittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

• • • • •

SEC. 8. The agreement to arbitrate—

• • • • •

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

• • • • •

SEC. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the

grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

(5153-2)

